THE HIGH COURT

COMMERCIAL

[2019 No. 6256 P]

BETWEEN

APPERLEY INVESTMENTS LIMITED, TAILWIND INVESTMENTS LIMITED AND MARTINA INVESTMENTS LIMITED

PLAINTIFFS

AND

MONSOON ACCESSORIZE LIMITED

DEFENDANT

AND

THE HIGH COURT

COMMERCIAL

[2019 No. 5745 P]

BETWEEN

R.E.S.A.M. CORK U.C. AND R.E.S.A.M. PROPERTIES LIMITED

PLAINTIFFS

AND

MONSOON ACCESSORIZE LIMITED AND MONSOON ACCESSORIZE IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 20th October, 2020

Introduction

1. In circumstances where the principal issues which arise for consideration in both of the above proceedings are identical, both sets of proceedings were directed to be tried together. The trial took place before me, by way of a remote hearing, on 19th and 20th May, 2020. Although both proceedings were commenced by plenary summons, the hearing, save to a very limited extent took place on the basis of affidavit evidence. There is substantial agreement between the parties as to the underlying facts. The only significant factual dispute which arose between the parties was in relation to certain aspects of English law. In circumstances where the parties sought to rely on English law to some extent in support of their respective positions, English law (like any other foreign law) falls to be proved as a matter of fact.

2. The relevant details concerning the parties are as follows:-

(a) Apperley Investments Ltd and its co-plaintiffs in the first set of proceedings are the landlords of premises occupied by the defendant at 74 Grafton Street, Dublin 2 *("the Dublin premises")* under the terms of a lease dated 10th February, 2005 made initially between Michael Enoch, Lorraine Enoch and Martina Investments Ltd trading as The Town Partnership as landlord and the defendant as tenant (*"the Dublin lease").* The Dublin lease is for a term of 25 years from 20th August, 2004. The reserved basic rent was initially €750,000 which was subject to review on 1st March 2009, 1st March 2014 and 1st March 2019. The rent has since been reviewed and now stands at €825,000 per annum as from 1st March 2014. Apperley Investments Ltd and its co-plaintiffs (*"the Dublin Landlords")* now hold the lessor's interest in the Dublin lease.

(b) The defendant, Monsoon Accessorize Ltd *("Monsoon")* is a company organised and existing under the laws of England & Wales. In the course

of 2019, it underwent a company voluntary arrangement (*"CVA")* in England under the terms of the Insolvency Act, 1986 (UK) (*"the UK Insolvency Act"*) which took effect on 3rd July, 2019. By its terms, the CVA purported to modify certain provisions of the Dublin lease (and the Cork lease as described below) and in particular it purported to effect very significant reductions in the amount of rent payable by Monsoon under the Dublin lease.

(c) R.E.S.A.M. Cork U.C. and its co-plaintiff in the second set of proceedings (*"the Cork landlords")* are the landlords of the premises situated at 35, 36 and 37 Patrick's Street, Cork (*"the Cork premises")* which are the subject of two leases. The first named plaintiff in these proceedings is the owner of that part of the freehold of those premises which are the subject of a lease dated 26th May, 1977 (*"the 1977 lease")* between Cordelia Investments, as landlord, and Associated Restaurants (Ireland) Ltd, as tenant. The 1977 lease was for a term of 33 years from 1st February, 1977 subject to the initial yearly rent of IR£15,000. The tenant's interest under the 1977 lease was subsequently transferred to the second named defendant in the proceedings ("*MAIL")* which is an Irish company with a registered office at the address of the Dublin premises above. In turn, the tenant's interest was assigned by MAIL to Monsoon which is the same entity as the defendant named in the Dublin proceedings.

(d) The second named plaintiff is the owner of the freehold in the remaining interest in 35, 36 and 37 Patrick's Street, Cork which is the subject of a lease dated 26th January, 2005 made between the second named plaintiff

as landlord and MAIL as tenant (*"the 2005 Lease").* Under the 2005 Lease, Monsoon was named as guarantor. However, on 21st June, 2013, the tenant's interest under the 2005 Lease was assigned to Monsoon. As part of that arrangement, MAIL guaranteed the due performance of the 2005 Lease by Monsoon.

(e) The total annual rent payable under both the 1977 and the 2005 leases is €735,000.

(f) Although MAIL is no longer a tenant of the Cork premises, it is pursued by the plaintiff pursuant to the guarantees given by it in 2013 in respect of Monsoon's obligations as tenant under both the 1977 Lease and the 2005 Lease. In due course, it will be necessary to examine the terms of the guarantees in more detail. It should be noted that both guarantees are governed by Irish law. It should also be noted that MAIL was not a party to the CVA involving Monsoon.

3. Subsequent to the hearing in May 2020, I was informed in June 2020 that Monsoon had been placed in administration in the United Kingdom and that MAIL had been placed in liquidation in Ireland. Notwithstanding these events, I was nonetheless requested to complete my judgment on the basis that the issues raised in the proceedings were said to be important and it was also suggested that, in any event, my judgment on the issues would assist in the quantification of the claims to be made by the Cork and Dublin landlords in the administration of Monsoon and in the liquidation of MAIL respectively. In addition, it was submitted that a judgment remained necessary in order to address the liability for the costs of these proceedings. Thus, although there was no longer any urgent need to deliver judgment, I agreed to prepare a judgment addressing the issues which were debated before me in May 2020.

4. The main claim made both in the Dublin proceedings and in the Cork proceedings is a declaration that the terms of the leases continue in full force and effect and are unaffected by any modification arising under the terms of the CVA. In the alternative, a declaration is sought pursuant to Article 33 of Regulation (EU) 2015/848 of 20th May, 2015 on Insolvency Proceedings (Recast) (which I will refer to either as *"the Recast Insolvency Regulation"* or *"the Regulation")* that the CVA, insofar as it purports to effect any variations of or modifications to the terms of the leases, is not entitled to be recognised or enforced in the State on the grounds that its enforcement would be manifestly contrary to the State's public policy.

5. Specific performance is also sought of the leases (in their unmodified terms) as against Monsoon. In addition, insofar as the Cork proceedings are concerned, a declaration is sought that the obligations of MAIL, as a surety, in respect of the 1977 and 2005 Leases are not released, determined, discharged or in any way lessened by any purported variation of those leases pursuant to the CVA.

6. In response, Monsoon has defended the proceedings on the basis that, pursuant to Articles 19, 20 and/or 32 of the Recast Insolvency Regulation, the court is required to recognise and enforce in full the terms of the CVA. In addition, objection is taken on the basis that none of the plaintiffs sought to challenge the terms of the CVA before the courts of England & Wales whether pursuant to s. 6 (1) of the UK Insolvency Act or otherwise and that the initiation or prosecution of these proceedings by the plaintiffs is prohibited by the doctrine of *res judicata*, the doctrine of issue estoppel and/or the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

7. In reply, the plaintiffs have alleged that Monsoon and MAIL are estopped from objecting to the institution and prosecution of these proceedings in Ireland by reason of the contents of a letter sent by its Birmingham Solicitors, Messrs.

Shoosmiths, on 2nd July, 2019. That letter was sent in response to letters sent by the solicitors acting for the respective Cork and Dublin plaintiffs on 30th June, 2019 and 1st July, 2019 in which issues were raised in respect of the operation of Article 11 of the Recast Insolvency Regulation. In response, Messrs. Shoosmiths stated that, if the position taken in the correspondence from the plaintiff's solicitors is correct with regard to Article 11, then the proposed CVA *"is of no effect in relation to the Lease."* The correspondence in question is addressed in more detail below.

Relevant facts

8. Before addressing the legal issues in any more detail, it is necessary to summarise the relevant facts. Although the parties are in dispute as to the effect of the guarantees given by MAIL (and as to the effect of the CVA, if any, on the guarantees), there is no dispute between the parties as to the existence of the leases or as to their terms and the legal effect of their obligations absent the CVA. If one ignores any potential effect of the CVA, the combined rent due in respect of the Cork premises amounts, as noted above, to €735,000 per annum. Assuming the leases continued to the date of their scheduled expiry, there would be a total sum of more than €3.5 million due.

9. As further noted above, in the case of the Dublin premises, the current rent is €825,000 per annum. If that lease were to continue until its scheduled expiry, the amount of rent falling due would exceed €8 million.

10. On 20th June, 2019, the directors of Monsoon issued proposals for a CVA under the UK Insolvency Act. The CVA process (which does not involve any active supervision by a court) bore record number CR-2019-BHM-000514 and was supervised by Mr. Ian Colin Wormleighton and Mr. Mathew David Smith of Deloitte LLP of Birmingham. For this purpose, s. 1 (2) of the UK Insolvency Act requires that

the CVA process must be supervised by a person who is qualified to act as an insolvency practitioner.

11. At the time the CVA proposals were issued in June 2019, Monsoon had a substantial leasehold property portfolio mainly situated in the United Kingdom but also including the Cork and Dublin premises. In the summary statement of affairs as at 31st May, 2019 scheduled to the CVA proposal, landlords are the largest category of creditors of Monsoon. It was estimated that the total owed to landlords was of the order of £62.4 million sterling. A stated purpose of the CVA was to rationalise Monsoon's leasehold obligations, restore the viability of its business, improve its liquidity and balance sheet and enable it to meet its financial obligations and return to profitability.

12. Although the CVA process is not supervised by a court, the nominees supervising the process (in this case Mr. Wormleighton and Mr. Smith) were required, within 28 days after notice of the proposal for the CVA, to submit a report to the High Court of England & Wales stating whether, in their opinion, the proposed CVA had a reasonable prospect of being approved and implemented and whether the proposal should be considered by meetings of the company and of the company's creditors. As a matter of English law, the report was required to state why the supervisors considered that the proposal did or did not have a reasonable prospect of being approved and implemented and why the members should or should not be invited to consider the proposal. This follows from the provisions of ss. 2 of the UK Insolvency Act and Rule 2.9 (2) of the Insolvency Rules 2016 (UK) (*"the UK Insolvency Rules").*

The effect of the CVA on the leases

13. The proposed CVA divided Monsoon's leasehold portfolio into seven categories of landlords, determined by reference to the commercial and strategic importance of each premises. Both the Cork and Dublin leases were listed within category 6 which comprised those premises where Monsoon needed flexibility and a period of time to determine whether the premises could be financially viable. In summary, under the terms of the proposed CVA, leases within category 6 would be dealt with as follows:

(a) The rent payment date would be moved to monthly in advance;

(b) The rent would be reduced by 65%, but if no notice to terminate is given by either the landlord or Monsoon within a period of six months after 3rd July, 2019, the rent would be reduced to zero;

(c) The landlords would be given break rights at any time after 3rd July, 2019 by giving 60 days' prior notice to Monsoon;

(d) Equally, Monsoon, as tenant, would be given break rights by giving 60 days' prior notice to the landlord at any time after 3rd July, 2019;

(e) Dilapidations would be compromised but only in the event that the landlord exercised one of its break options, in return for Monsoon paying 50% of the value of the Dilapidations claims;

(f) Business rates were to be compromised in return for 20% of business rates which would become due during the remainder of the current business rates year (as defined);

(g) With effect from 3rd July, 2019, any provisions in the leases that provided for a right of early termination, or forfeiture by virtue of the entry into the CVA would be waived and released and the landlords would have no right to determine or amend the leases as a result of the CVA;

(h) With effect from 3rd July, 2019, each landlord would waive and release Monsoon from any breaches or defaults of any terms of the lease that may have arisen or might arise as a result of any event relating to the CVA.

14. Under s. 3 of the UK Insolvency Act and Rule 15 of the UK Insolvency Rules, a decision must be sought from the creditors of a company proposing a CVA as to whether the creditors approve the proposal. The decision of the company's creditors on that issue is to be made by a *"qualifying decision procedure"* which allows decisions to be made by a number of different procedures. According to the evidence as to English law before the court, a physical meeting of creditors usually takes place. At the respective meetings of the company and of the company's creditors, the CVA can be approved with or without modifications. A CVA (and any modification) will only be approved when three quarters or more (in value) of the creditors who respond vote in favour of it. In addition, a proposed CVA will not be approved if more than half of the total value of the unconnected creditors vote against it. Where the creditors have approved the CVA by the requisite majority, then the decision takes effect. Once the decision takes effect, s. 5 (2) of the UK Insolvency Act provides that the CVA will bind every person who, in accordance with the rules, was entitled to vote in the qualifying decision procedure, by which the creditor's decision to approve the CVA was made as if that person was a party to the voluntary arrangement. As explained in more detail below, this has been described in a number of English decisions as a type of *"statutory contract".*

15. In Monsoon's case, following the circulation of the proposals for a CVA on 20th June, 2019, A&L Goodbody Solicitors wrote on behalf of the Cork landlords, to the directors of Monsoon and to the joint supervisors contending that the purported effect of the proposals and leases in Ireland was contrary to Article 11 of the Recast

Insolvency Regulation. At this point, it should be noted that Article 11 addresses contracts relating to immovable property. It will be necessary, at a later point in this judgment, to examine its provisions in more detail. It is sufficient to note, at this stage, that under Article 11 (1), the effects of insolvency proceedings on a contract relating to immovable property are governed solely by the law of the member state within the territory where the property is situated. Article 11 (2) nonetheless gives jurisdiction to the *"court"* which opened main insolvency proceedings, in certain circumstances. Again, the provisions of Article 11 (2) are examined in more detail below.

The objections of the Cork and Dublin landlords

16. In the letter from A&L Goodbody of 27th June, 2019, it was noted that the proposed CVA proceeds on the basis that, if approved, it would bind all of Monsoon's creditors including the Cork landlords and that the CVA would be effective in Ireland in varying the terms of the Cork leases and in limiting Monsoon's liabilities to the Cork landlords under those leases. In the letter, A & L Goodbody contended that the proposal was misconceived and that the CVA would not be recognised or enforced in Ireland. The letter continued:

> *"While a UK … CVA falls within the scope of 'main insolvency proceedings" in the … Regulation … and thus must be recognised under Article 19, in all other EU Member States …, it remains clear, under Article 11 …, that Irish law continues to apply to all Irish leases, being contracts conferring the right to make use of immovable property.*
>
> *Any purported interference with our clients' property rights under the CVA would constitute an impermissible interference with, and unjust attack upon,*

our clients' constitutionally protected property rights and would therefore be at variance and unacceptable under Irish law.

Irish law … does not confer any power or competence upon an 'with out of court' body (such as a CVA) to terminate a contract conferring the right to acquire or make use of Irish immovable property. Indeed, under Irish law, a lease may be 'repudiated' in insolvency proceedings at the instance of the debtor (in the context of an examinership), but only where the prior approval of the … High Court has been obtained … and only where specific statutory preconditions are met. While a lease can, in those circumstances be 'repudiated' …, Irish law prohibits the inclusion of provisions varying obligations of lessees …. These protections form a fundamental part of Irish law in relation to property rights, which the Irish courts are duty bound to vindicate.

In light of the foregoing, the [regulation] cannot give the CVA proposal the effect you assert it has. Accordingly, we call on you to confirm that the provisions of the CVA proposal, insofar as they purport to impact on our clients' rights and entitlements, are hereby withdrawn. …

Please note that if we do not receive the requested confirmation and undertaking before 5 p.m. on … 1st July, 2019, our clients reserve the right to take all steps necessary to protect its interests, including (if necessary) the issuing of proceedings before the Irish High Court to vindicate its property rights….".

17. A similar letter was written by Walkers, solicitors, on behalf of the Dublin landlords, on 1st July, 2019. That letter also referred to Article 11 of the Recast Insolvency Regulation and the point was made that it was clear, under Irish law, that it

is not possible to modify terms of a lease in an examinership or liquidation process in Ireland. The letter continued in the following terms:

> *"8. Furthermore, we do not understand how proposals for a CVA … could be put forward to creditors for their vote without first making an application to the English Courts for the requisite order under Section (sic) 11 and all rights are reserved in this regard. …*
>
> *9. In any event, even if it is envisaged that the application is made following the creditors' vote but before the schemes' effective date, you would expect that at a minimum the English Court will require the filing of an Affidavit of laws detailing the Irish legislative position … and the limitations on the use of repudiation and/or disclaimer powers ….*
>
> *10. Accordingly, the … CVA shall have no force of law in Ireland. Please therefore confirm by return that references to the Landlord and to the Lease will be removed from the terms of the … CVA. If such confirmation is not received by 2 p.m. on Tuesday 2nd July, 2019, the Landlord reserves its rights to take all steps necessary to protect its interests, including (if necessary) the issuing of proceedings before the Irish High Court. … ".*

18. Shoosmiths Solicitors of Birmingham responded to both letters on 2nd July, 2019. The substantive part of the response is identical in both letters. It begins by noting the position taken by the landlords that the leases cannot be varied under the terms of the CVA by virtue of Article 11 of the Recast Insolvency Regulations. The letter then continues in the following terms:

> *"We do not agree that the position in relation to the efficacy of the … CVA on the Lease is as clear cut as you make out. Article 11 of the … Regulation must be considered in light of the other provisions of the … Regulation, a number of*

which directly contradict Article 11. For example, Article 7 (2) … states that the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure.

In particular, pursuant to Clause 7 (2) (e) of the … Regulation, the law of the State of the opening of the proceedings shall determine the effects of insolvency proceedings on current contracts to which the debtor is party.

It should be noted that, whilst Article 7 (1) is expressed to apply 'Save as otherwise provided in this Regulation', the same caveat has not been applied to Article 7 (2), leading to the conclusion that Article 7 (2) was intended to apply, notwithstanding any provisions of the contrary in the … Regulation.

As such, the position in relation to the applicability of the … CVA on the terms of the Lease is not quite as straightforward as you have asserted.

Turning to the remainder of your letter, your position appears to be somewhat confused. In the first instance, you claim that the … CVA, insofar as it relates to your client, is of no effect. You then request that the Company withdraws the terms of the … CVA, insofar as they relate to Your Client, and then threaten Court proceedings if such confirmation is not forthcoming ….

We make the following comments in relation to these provisions of your letter:

- *If your position is correct as regards Article 11 … (which is denied), then the … CVA is of no effect in relation to the Lease. On that basis, there is no need for the Company to withdraw the terms of the … CVA insofar as they relate to your client.*
- *The threat of Court proceedings at this time is wholly unnecessary and inappropriate. The Proposed CVA will only become operative if it is*

approved by the Company's creditors and members at the meetings due to take place on … 3rd July, 2019. As such, and at this time, any Court proceedings would be premature, as there is nothing which could be challenged under such proceedings; and

- *In the circumstances, and in particular in light of the financial position of the Company, as outlined in the Proposed CVA, we suggest that the interests of all parties would be better served by engaging in a meaningful and constructive manner in order to reach a mutually beneficial solution to the matter. In this regard, we confirm that our client is open to such discussions with your client.*

We look forward to hearing from you".

19. There was no response to the Shoosmiths letter from either A & L Goodbody on behalf of the Cork landlords or from Walkers on behalf of the Dublin landlords. Nor was any court challenge taken by any of the landlords at that time.

The approval of the CVA at the creditors' meeting

20. The meeting of creditors took place on 3rd July, 2019 followed by a meeting of members on 8th July, 2019.

21. On 8th July, 2019, Mr. Wormleighton, on behalf of the joint supervisors, submitted a report to the High Court of England & Wales as required by ss. 4 (6) and 4 (6A) of the UK Insolvency Act. The submission of this report does not involve any hearing before the court.

22. In his report, Mr. Wormleighton, listed the creditors who attended the creditors meeting. None of the Dublin or Cork landlords attended either in person or by proxy. Of the creditors who did attend, unconnected creditors owed a total of £88,186,672.73 sterling (representing 84.1% in value of those who attended either in

person or by proxy) voted in favour of the proposal while creditors owed a total of £16,620,262.01 (representing 15.9% in value of those who attended either in person or by proxy) voted against the proposal. As more than three quarters in value of the creditors who responded voted in favour of the proposed CVA, the CVA was approved. The report to the English High Court records that two modifications to the CVA were proposed but they were not accepted by Monsoon and were not the subject of a vote.

The legal effect under the UK Insolvency Act of the approval of the CVA

23. Under s. 4A (2) of the UK Insolvency Act, a CVA takes effect once the creditors have approved it. Furthermore, under English law, a CVA will thereafter bind all of the creditors including those who did not vote. Section 5 of the UK Insolvency Act makes this clear. Section 5 provides as follows:

> *"(1) This section applies where a decision approving a voluntary arrangement has effect under section 4A.]*
>
> *(2) The voluntary arrangement —*
>
> *(a) takes effect as if made by the company at the time the creditors decided to approve the voluntary arrangement, and*
>
> *(b) binds every person who in accordance with the rules—*
>
> *(i) was entitled to vote in the qualifying decision procedure by which the creditors' decision to approve the voluntary arrangement was made, or*
>
> *(ii) would have been so entitled if he had had notice of it,*
>
> *as if he were a party to the voluntary arrangement".*

24. As a consequence of s. 5, the English authorities have characterised CVAs as giving rise to a type of statutory contract albeit a non-consensual one insofar as

dissentients and non-participating creditors are concerned. In *Re Brelec Installations Ltd* [2001] BCC 421 at p. 423, Blackburne J. explained the position as follows:

> *"…the effect of the creditors' approval of the debtors' proposal is, as is well-established, to give rise to a species of statutory contract between the creditors bound by the arrangement on the one hand and the debtor on the other".*

25. Similar observations were made by Peter Gibson L.J. in *Re: NT Gallagher & Son Ltd* [2002] 1 WLR 2380 who said, at para. 4 of his judgment that a CVA:

> *"operates as a form of statutory contract to which even dissentients and non-voters receiving notice of and entitled to vote at the meeting are treated as parties".*

26. The position of dissentients was explained in more detail by Chadwick L.J. in *Johnson v. Davies* [1999] Ch. 117 at p. 138 in the context of individual voluntary arrangements (which are the equivalent of CVAs in the case of personal insolvency) in the following terms:

> *"Unlike the earlier legislation, s.260 (2) … does not, in terms, impose the arrangement on the dissenting creditor whether or not he has agreed to its terms; rather, he is bound by the arrangement as the result of the statutory hypothesis. The statutory hypothesis requires him to be treated as if he had consented to the arrangement. The consequence … is that the legislature must be taken to have intended that both the question of whether the debtor is discharged by the arrangement and the question whether co-debtors and sureties are discharged by the arrangement were to be answered by treating the arrangement as consensual; that is to say, by construing its terms as if they were terms of the consensual agreement between the debtor and all those*

creditors who, under the statutory hypothesis, must be treated as being consenting parties".

27. As noted previously, the approval of a CVA does not require any court involvement. As a consequence, any creditor aggrieved by a CVA, does not have any right or opportunity to make representations to a court before the CVA is voted on and approved. Once a CVA has been approved by the requisite majority of unconnected creditors, a disgruntled creditor would have the ability to bring an application under s. 6 of the UK Insolvency Act. However, such an application may only be made once the CVA has taken effect. Thus, the court will only have a role after the event. There is no statutory mechanism by which the court can be involved prior to the approval of a CVA by the requisite majority of unconnected creditors.

28. Section 6 (1) envisages two specific grounds of challenge namely (a) unfair prejudice or (b) some material irregularity at or in relation to the meeting or in relation to the procedure by which the company's creditors decided whether to approve the CVA. Insofar as relevant, s. 6 (1) provides as follows:

"(1) Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely—

(a)that a voluntary arrangement which has effect under section 4A unfairly prejudices the interests of a creditor, …;

(b)that there has been some material irregularity at or in relation to the meeting of the company, or in relation to the relevant qualifying decision procedure."

29. Section 6 (2) makes clear that a person entitled to vote in the relevant qualifying decision procedure (namely the procedure by which creditors decide

whether to approve a voluntary arrangement) will be entitled to apply to the court under s. 6 (1) on either or both of the grounds specified in that subsection.

30. In theory, a creditor could also attend the meeting of creditors and make representations to that meeting and propose a modification to the proposed CVA. Under Rule 15.34 (3) (a) of the UK Insolvency Rules, such a modification would require approval by at least three quarters (by value) of the creditors voting on the CVA. However, as Mr. Tom Smith Q.C. observed in his expert report on behalf of the landlords, the practical ability of a creditors meeting to take into account representations made by any one or more creditors (or to consider any proposed modification) may well be impeded by the fact that many votes are cast through proxies given in advance (often to the chairman of the meeting). Furthermore, creditors are entitled to vote on the proposed CVA and on any proposed modification in what they consider to be their own best interests.

The commencement of proceedings in Ireland by the Cork and Dublin landlords

31. No attempt was made by either the Dublin landlord or the Cork landlords to attend the creditors' meeting and seek a modification of the proposal. Nor was any application brought by any of the landlords, in the English courts, under s.6 of the UK Insolvency Act. Instead, the present proceedings were brought by plenary summons issued on 19th July, 2019 (in respect of the Cork Landlords) and on 7th August, 2019 (in respect of the Dublin landlord). As noted previously, the claim made by each of the landlords is for a declaration that the relevant lease continues in full force and effect and is unaffected by any purported modification or variation made pursuant to the CVA. Alternatively, a declaration is sought pursuant to Article 33 of the Recast Insolvency Regulation that the CVA, insofar as it purports to effect any variations of or modifications to the terms of the respective leases, is not entitled to be recognised

or enforced in the State on the grounds that the CVA is manifestly contrary to the public policy of the State.

32. In making their case, the landlords rely principally on Article 11 of the Recast Insolvency Regulation (which specifically deals with contracts relating to immovable property). The landlords' reliance on Article 33 (dealing with public policy reasons for refusing to enforce a judgment handed down in another Member State) has been put forward as an alternative basis to the principal case made by them with reference to Article 11. In this context, it may seem odd that a CVA could be regarded as a *"judgment".* However, the Recast Insolvency Regulation expressly extends to the CVA procedure in the United Kingdom. For the reasons explained in more detail below, a CVA constitutes *"insolvency proceedings"* for the purposes of the Recast Insolvency Regulation. It should also be noted that, for this purpose, a *"court"* is defined in the Regulation as including not just a judicial body but any other competent body empowered in a Member State to open insolvency proceedings or to confirm such opening or to take decisions in the course of such proceedings.

33. In order to understand the issues which arise, it is necessary to consider the terms of the Recast Insolvency Regulation. As an EU Regulation, this has binding force in Ireland.

The Recast Insolvency Regulation

34. Recital 66 to the Recast Insolvency Regulation tells us that the Regulation is intended to set out "*uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law".* The same Recital also specifies that, unless otherwise stated, the law of the Member State of the opening of insolvency proceedings should be applicable (which the Regulation refers to as the *lex concursus).* Recital 66 continues in the following terms:

"This rule on conflict of laws should be valid both for the main insolvency proceedings and for local proceedings. The lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings".

35. Notwithstanding the provisions of Recital 66, the Regulation recognises in Recital 67 that the approach described in Recital 66 *"may interfere with the rules under which transactions are carried out in other Member States".* For that reason, Recital 67 continues in the following terms:

"To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provision should be made for a number of exceptions to the general rule".

36. Thereafter, a number of Recitals deal with particular forms of exception to the general principle stated in Recital 66. These include rights *in rem* (addressed in Recital 68), payment systems and financial markets (addressed in Recital 71) and employment rights (which are the subject of Recital 72). There is no specific Recital addressing contracts relating to immoveable property (such as leases) but these are addressed in Article 11 (dealt with below).

37. Article 2 of the Regulation provides a number of important definitions. These include the definition of *"insolvency proceedings"* which are defined by reference to the proceedings listed in Annex A. In the case of the United Kingdom, Annex A expressly includes *"voluntary arrangements under insolvency legislation".* Thus, CVAs under the UK Insolvency Act, are included among "*insolvency proceedings"* for the purposes of the Regulation. As noted above, the definition of *"court"* in Article 2 (6) (ii) expressly extends not only to a judicial body but also *"any other*

competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings".

38. In turn, Article 2 (7) defines a *"judgment opening insolvency proceedings"* as including *"the decision of any court to open insolvency proceedings…".* Given the definition of *"court",* it appears to follow that a judgment opening insolvency proceedings is capable of being taken by a non-judicial body. This is reinforced by Recital 20 which states:

> *"Insolvency proceedings do not necessarily involve the intervention of a judicial authority. Therefore, the term 'court' in this Regulation should, in certain provisions, be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. …"*

39. Article 3 (1) provides that the courts of the Member State in whose territory the centre of main interests of a debtor is situated are to have jurisdiction to open insolvency proceedings. These are known in the Regulation as *"main insolvency proceedings"*. For this purpose, the centre of main interests is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of corporate bodies, there is a rebuttable presumption that its centre of main interests is located at its registered office. There is no dispute between the parties here that the centre of main interests of Monsoon is in the jurisdiction of England & Wales. As explained in para. 42 this has the consequence that English law applies, except where the Regulation otherwise provides.

40. Article 3 also envisages that secondary proceedings in another Member State may be necessary. This is consistent with Recitals 22 and 23. Recital 22 acknowledges that, as a result of wide differences between the substantive laws of the

Member States, it is not practicable to introduce insolvency proceedings with universal scope throughout the EU. Furthermore, Recital 23 recognises that, in order to protect the diversity of interests, secondary insolvency proceedings (to run in parallel with the main insolvency proceedings) may be opened in a Member State where a debtor has an establishment. Recital 23 makes clear that the effects of secondary insolvency proceedings are limited to the assets located in that State. Article 3 (2) thus provides that the courts of another Member State will have jurisdiction to open insolvency proceedings against a debtor *"only if it possesses an establishment within the territory of that other Member State"* in which case the effects of those proceedings "*shall be restricted to the assets of the debtor situated in the territory of the latter Member State".*

41. Article 4 requires a court (which is asked to open insolvency proceedings) to examine, of its own motion, whether it has jurisdiction pursuant to Article 3. In addition, Article 5 permits the debtor or any creditor to challenge the decision opening main insolvency proceedings.

Article 7

42. Consistent with Recital 66, Article 7 (1) provides that, save as otherwise provided in the Regulation, the law applicable to insolvency proceedings and their effects is to be that of the Member State of the territory in which such proceedings have been opened. In turn, Article 7 (2) provides that the law of the State of the opening of proceedings is to determine the conditions for the opening of the proceedings, their conduct and their closure and in particular is to determine a number of specific matters. Among the matters there enumerated are the effects of insolvency proceedings on current contracts to which the debtor is party (expressly provided for in Article 7 (2) (e)), the conditions for and the effects of closure of insolvency

proceedings *"in particular by composition"* (this is expressly addressed in Article 7 (2) (j)) and creditors' rights after the closure of insolvency proceedings (which is expressly identified in Article 7 (2) (k)).

43. As prefigured in Recital 68, Article 8 (1) provides that the opening of insolvency proceedings is not to affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets which are situated within the territory of another Member State at the time of opening of the proceedings. However, Article 8 (2) suggests that rights *in rem* have a particular meaning. None of those meanings appear to be immediately relevant in the context of the issues which arise in respect of the Cork and Dublin leases. In those circumstances, I do not believe that it is necessary to address Article 8 in any detail. It is sufficient to note that Article 8 is clearly an exception to the provisions of Article 7. As noted in para. 42 above, Article 7 (1) provides that the law of the State of the opening of proceedings will govern the insolvency proceedings *"save as otherwise provided in this Regulation".* Further exceptions to this general rule are to be found in Article 12 (which expressly provides that the rights and obligations of parties to a payment or settlement system or to a financial market are governed solely by the law of the Member State applicable to that system or market) and Article 13 (which provides that the effects of insolvency proceedings on employment contracts and relationships is governed solely by the law of the Member State applicable to the contract of employment).

Article 11

44. A further exception is to be found in the provisions of Article 11 of the Regulation. Article 11 is of crucial importance for present purposes. Article 11

expressly deals with contracts relating to immoveable property. Article 11 (1) provides as follows:

> *"The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated".*

45. The rationale underlying Article 11 can be traced back to the Virgos Schmidt report of May 1996 (in respect of what was then intended to be a Convention on Insolvency Proceedings). At p. 80 of their report, the authors provided commentary on Article 8 of that Convention which was in identical terms to Article 8 of the Insolvency Regulation 2000 (Council Regulation (EC) No. 1346/2000), the predecessor to the Regulation, and which was also in identical terms to Article 11 (1) of the Regulation. At paras. 117-118 of their report, the authors stated as follows:

> *"117. The general rule on conflicts of law is that it falls to the law of the … State of the opening of proceedings to regulate the effects of the proceedings on current contracts to which the debtor is a party ….*
>
> *To this extent, the applicable national insolvency law interferes with and overlaps the rules applicable to contracts, which derive from the law applicable under the 1980 Rome Convention.*
>
> *118. This rule, which overall is positive for the general interest of the creditors may be detrimental to other interests. In all the Contracting States, contracts covering immoveable property are subject to special rules, both of conflict of laws as well as of international jurisdiction, in order to take into account several interests: those of the parties to the contract (e.g. tenants) and*

the general interests protected by the State in which the immoveable property is to be found.

Protection of these specific interests justify an exception to the application of the law of the State of the opening of proceedings. Hence Article 8 makes the effect of the insolvency proceedings exclusively subject to the law of the … State where the … property is located.

Solely means that only the law of the … State on location of the immoveable (including its insolvency law), and not the 'lex concursus' … is applicable to establish these effects".

46. A similar explanation is given by Moss, Fletcher & Isaacs on the EU Regulation on Insolvency Proceedings (3rd ed., 2016) at para. 8.239 where the authors state:

"The general principle of the Regulation is that the law of the Member State of the opening of proceedings applies to govern those proceedings including determining the effects of the proceedings on any contracts to which the debtor is a party …. However, it was recognized that there is an equally important interest in permitting the relevant national law to apply to contracts concerning immovable property. In particular, contracts relating to immovable property encompass a number of special factors, including of course the fact that the property is permanently located within a particular state, and the fact that contracts relating to immovable property are subject to special rules in many states, which makes the application of relevant national law desirable. Article 8 … therefore gives effect to this by providing that effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the

Member State within the territory of which the immoveable property is situated. The reference to the law of that Member State includes a reference to its insolvency law.

Article 8 … applies to contracts to 'acquire' or 'make use' of immovable property and it therefore applies to both contracts for the use of immovable property (such as leases) and contracts covering the sale and transfer of immovable property'.

The interaction between Article 7 and Article 11

47. Although Moss, Fletcher & Isaacs refer in the above passage to Article 8 of the 2000 Regulation, their observations apply with equal force to Article 11 (1) which, as noted above, is in identical terms to Article 8. Notwithstanding these observations by the authors of the Virgos Schmidt report and of Moss, Fletcher & Isaacs, there was a debate at the hearing as to the interaction between Article 7 and Article 11. It will be recalled in this context, that in the Shoosmiths' letters of 2nd July, 2019 (quoted in para. 18 above) it was argued that Article 11 must be considered in light of the other provisions of the Regulation including Article 7 (2). In the course of the hearing, certain aspects of Article 7 (2) were emphasised by counsel for Monsoon including the provision contained in Article 7 (2) (j) that the law of the State of the opening of proceedings is to determine the conditions for and the effects of closure of those proceedings (in particular by composition). In the Shoosmiths' letter of 2nd July, 2019, the argument was made that, whilst Article 7 (1) is expressly to apply "*save as otherwise provided in this Regulation",* the same caveat has not been applied to Article 7 (2) and it was suggested that this supports the conclusion that Article 7 (2) was intended to apply notwithstanding any provisions to the contrary in the Regulation. I do not believe that such an argument is sound. It seems to me that

Article 7 (2) is simply an enumeration of the matters which can be determined, in accordance with Article 7 (1) by the law of the State of the opening of insolvency proceedings. I do not believe that there is any plausible basis to suggest that the matters identified in Article 7 (2) can be said to operate notwithstanding any provision to the contrary elsewhere in the Regulation. Thus, for example, there can be no doubt that Article 11 is an exception to the provisions of Article 7 (2) (e) which provides that the law of the State of the opening of insolvency proceedings is to determine the effects of those proceedings on *"current contracts to which the debtor is party".* In my view, it is clear that Article 11 specifically provides a different rule in relation to contracts which fall within its ambit. In those circumstances, it seems to me to follow that Article 11 displaces the application of Article 7 (2) (e) in any case covered by Article 11. That is the unsurprising view taken, for example, by Bork & Mangano in European Cross-Border Insolvency Law (2016) at para. 4.81 where they say:

> *"4.81… Art. 11 (1) states that 'the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated'. Thus, the law of the State of the opening of proceedings cannot compel performance or termination of the contract; only the law of the State in which the immoveable property is situated (lex rei sitae) can do that. This is therefore an exception to the general rule stated in Art. 7 (2) (e), which provides that the lex fori concursus shall govern the effects of the insolvency proceedings on current contract. The exception is justified by the particular and distinct regimes Member States have in relation to contracts concerning immoveable property as well as the particular vulnerabilities of parties to those contracts, especially tenants".*

48. That said, Article 11 will only disapply the provisions of Article 7 to the extent that Article 11 makes contrary provision to Article 7. Thus, for example, Bork & Mangano, in para. 4.82, suggest that Article 11 is not an exception to Article 7 (2) (m) which deals with rules relating to voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors. It might, accordingly, be argued that, likewise, Article 11 does not address the conditions for or the effects of closure of insolvency proceedings and that, accordingly, it cannot be said to be an exception to Article 7 (2) (j). However, if the closure of insolvency proceedings in accordance with the law of the State of the opening of such proceedings affects a contract falling within Article 11 in a manner inconsistent with the law of the State where the immoveable property the subject of that contract is situated, that would have the potential to lead to a conflict between the two provisions and, in such circumstances, it would seem to me to follow that Article 11 (to the extent that it is inconsistent with Article 7 (2) (j)) would have to prevail. Whether there is such a conflict in this case will require careful analysis of the meaning and effect of Article 11 and, in particular, Article 11 (2) (addressed further below).

The arguments as to the meaning and effect of Article 11

49. There was also some debate at the hearing as to whether the provisions of Article 11 (1) extend to a lease. In my view, there is no doubt that Article 11 (1) does extend to a lease. In simple terms, a lease is a contract conferring the right on a lessee to make use of immoveable property. The lease therefore falls within the express words of Article 11 (1). It was argued on behalf Monsoon that, while Article 11 (1) specifically mentions the right to acquire and make use of immovable property, it does not refer to other rights that might be involved in such a contract and therefore cannot extend to the issues which arise between the parties to these proceedings

insofar as the CVA purports to interfere with the rights of the landlords under the Cork and Dublin leases. I cannot accept that argument. Article 11 (1) is quite clear in its terms. It creates an exception to Article 7 (1) in respect of contracts conferring the right to acquire or make use of immoveable property. The exception is not limited to those aspects of the contract which are concerned solely with the right to acquire or make use of the immoveable property. The reference in Article 11 (1) to *"the right to acquire or make use of immoveable property"* is there to identify the type of contract which is subject to the exception created by Article 11 (1). If a contract falls within the ambit of those words, then it follows, having regard to the language used in Article 11 (1) that the effects of insolvency proceedings on that contract will be governed solely by the law of the Member State within whose territory the immoveable property, the subject matter of that contract, is situated. Thus, if Article 11 (1) stood on its own, one could readily conclude that the law of Ireland applied to the issue as to the effects of the CVA process on the Cork and Dublin leases. However, Article 11 (1), unlike its predecessor provision contained in Article 8 of the Insolvency Regulation 2000 does not stand on its own. Article 11 (1) must now be read in conjunction with Article 11 (2).

50. Article 11 (2) now envisages that the *"court"* which opened main insolvency proceedings may have a role notwithstanding that the law governing the effects of insolvency proceedings on the relevant contract is the law of a different Member State. In particular, Article 11 (2) contemplates that the *"court"* which opened main insolvency proceedings will have jurisdiction to approve the termination or modification of a contract relating to immoveable property where two specific conditions are satisfied. Article 11 (2) provides as follows:

"The court which opened main insolvency proceedings shall have jurisdiction to approve the termination or modification of the contracts referred to in this Article where:

(a) the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings; and

(b) no insolvency proceedings have been opened in that Member State."

51. Moss, Fletcher & Isaacs, at para. 8.597 address Article 11 (2) in the following terms:

"Whereas Article 11 (1) is a general exclusion from the effects of insolvency proceedings on a contract relating to immoveable property, causing the contract to be governed solely by the law of the Member State within the territory of which the immoveable property is situated, Article 11 (2) … creates an exception to that exception. It confers jurisdiction on the court which has opened main insolvency proceedings to approve the termination or modification of contracts relating to immoveable property in certain circumstances. The relevant circumstances are where the law of the Member State applicable to the contract requires that the contract may only be terminated or modified with the approval of the court opening insolvency proceedings and where no insolvency proceedings have been opened in that Member State. Without this conferral of jurisdiction, a serious problem may have arisen in such a case, if, for example, it were not possible to open secondary proceedings in the Member State within the territory of which the moveable property was situated. In any event, even where the opening of local

territorial proceedings is possible in such a case, it would be an unnecessary expense and complication, which is avoided by this additional provision".

52. A similar explanation is provided by Bork & Mangano who say, at para. 4.84:

"Art. 11 (2) operates where the law applicable to the contract under Art. 11 (1) (the lex rei sitae) states that a termination or modification of the contract is subject to the approval of the court opening insolvency proceedings, and no insolvency proceedings have been opened in the relevant Member State. In such a case, the court which opened main insolvency proceedings may approve the termination or modification. Art. 11 (2) does not alter the effect of Art. 11 as a whole, which is to make the lex rei sitae the applicable law. The effect is to enhance the applicability of the lex rei sitae by making sure that where it has a procedural effect which is impossible to fulfil, the court opening proceedings can take the place of the court designated under it and therefore fulfil it".

53. Counsel for the landlords placed some reliance on the use of the word *"where"* in Article 11 (2). He argued that the opening words of Article 11 (2) will only be engaged where the provisions of para. (a) and (b) are both satisfied. Accordingly, counsel submitted that the allocation of competence to the *"court"* which opened the main proceedings is not automatic. The two conditions for its operation (namely those described in paras. (a) and (b)) must be satisfied. Counsel argued that this followed from the clear language of Article 11 (2). For the avoidance of any doubt, he also referred, in this context, to Brinkmann's "European Insolvency Regulation" (2019) at p. 143 where the authors expressly describe the provisions of Article 11 (2) as requiring that two conditions must be cumulatively met for the provision to bite. He therefore submitted that a conscious decision has to be made by

the relevant *"court"* as to whether those conditions have, in fact, been satisfied before any decision can be made to apply Article 11 (2).

54. Counsel for the landlords stressed that, under Article 11 (2), the *"court"* which opened the main insolvency proceedings does not have the power to apply its own law in relation to contracts relating to immoveable property. He argued that Article 11.1 makes very clear that the law governing such a contract is solely the law of the Member State within whose territory the immoveable property is situated. Counsel for the landlords relied, in this context, on the observations made by Bork & Mangano (quoted above) to the effect that, where Article 11 (2) applies, the court opening proceedings takes the place of the court designated under Article 11 and fulfils the function of the latter. Counsel suggested that the court opening proceedings acts as a proxy for the court of the jurisdiction in which the immoveable property is situated. Counsel adopted, as part of his submission, the following statement by Brinkmann at p. 144:

> *"9. The legal consequence of para. 1 is that the law of the Member State in whose territory immoveable property is located is exclusively determinative for the effects of the insolvency proceedings on a contract conferring the right to acquire or use that property. 'Exclusively' means that only the law of the State where the property is situated (including that State's insolvency law) is applicable, but not the lex fori concursis in accordance with Article 7 ....*
>
> *10. Where the conditions contained in para. 2 are met, the approval requirements in the State in which the property is located will be recognised, but the competence to provide such approval will be allocated to the court that it opened the main insolvency proceedings.* ***Consequently, the court that has opened the insolvency proceedings must apply for in law, i.e. the law of the***

Member State in which the property is situated *when approving or modifying such contracts." (*Emphasis added).

55. Counsel for the landlords therefore argued that, in this case, if the CVA process was to comply with the requirements of the Regulation, the relevant conditions contained in Article 11 (2) would have to be met as part of that process and, in particular, Irish law would have to be applied in addressing the effect of the CVA process on the rights of the Irish landlords under the Cork and Dublin leases. He suggested that the proposed modification of the Irish leases by the CVA could not be achieved applying Irish law. In making that argument, counsel referred to the provisions of s. 544 (1) of the Companies Act, 2014 dealing with the position of leases in an examinership (which is the nearest equivalent process in Ireland to a CVA). Under s. 544 (1) of the 2014 Act, proposals for a compromise or scheme of arrangement in an examinership *"shall not contain, nor shall any modification by the court under Section 541 of such proposals result in their containing"* a provision which provides for either (or both) a reduction in the amount of any rent reserved under the lease or a requirement that the lessor shall not (in the event of non-payment of rent or a failure to comply with any other covenant or obligation of the lease) exercise any right to recover possession of the land or to forfeit the lease or recover the amount of the rent or claim damages in respect of the failure to comply with such a covenant or obligation.

56. In contrast, counsel for Monsoon argued that, once the conditions to the operation of Article 11 (2) have been triggered, the court opening main insolvency proceedings must be entitled to apply its own law. He submitted that there is nothing in the language of Article 11 (2) which suggests that the jurisdiction of the *"court"* which opened main insolvency proceedings to approve the termination or

modification of a contract relating to immovable property is in any way confined to the jurisdiction to exercise the law of the Member State within whose territory the property in question lies. He contrasted the language used in Article 11 (2) with the equivalent provision (dealing with employee rights) contained in Article 13 (2) which expressly provides that the courts of the Member State in which secondary insolvency proceedings relating to employment relationships may be opened *"shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State".*

57. Counsel for Monsoon also argued that if the *"court"* opening main insolvency proceedings is to exercise a jurisdiction given by Article 11 (2), it must do so in accordance with its own insolvency law. Counsel submitted that Article 11 (1) has to be read in the context of Article 11 (2) and the jurisdiction conferred by the latter. He suggested that it makes sense that the *"court"* having jurisdiction over the main proceedings should be entitled, as part of the *"overall integrity"* of the insolvency process being managed by that court, to vary or terminate the relevant contracts (in this case the Cork and Dublin leases).

58. I have to say that I find it difficult to see how the arguments advanced on behalf of Monsoon (as outlined in paras. 56 to 57 above) can be reconciled with the clear language of Article 11. In the first place, Article 11 (1) expressly provides that the law of the *situs* of the immoveable property must be applied. Article 11 (2) does not, by its terms, give the court, before which the main proceedings were opened, the ability to apply its own law. Article 11 (2) merely confers on that court jurisdiction to approve the termination or modification of a contract falling within Article 11 (1) where the conditions set out in para. (a) and (b) are satisfied. While the court opening

main insolvency proceedings will be entitled to exercise jurisdiction, there is no mandate within Article 11 conferring any power on that court to apply its own law. Article 11 (1) is not modified in any way. Thus, the effects of insolvency proceedings on a contract falling within Article 11 (1) remain governed *"solely by the law of the Member State within the territory of which the immoveable property is situated"*.

The obligation on the court to recognise and give effect to the CVA

59. In the circumstances outlined in para. 58 above, I must reject the argument made by counsel for Monsoon in relation to Article 11 (2). However, that is not the end of the enquiry. Counsel for Monsoon has highlighted and invoked the provisions of the Regulation dealing with mutual recognition. He argued that it was a key principle of the Regulation that this court must recognise the *"judgment"* and the composition with creditors embodied in the CVA (as approved at the creditors' meeting) and that it is not open to the landlords to argue that some part of the CVA process was invalid or was arrived at contrary to the provisions of Article 11. Counsel submitted that, if such an argument was to be made, the only appropriate mechanism by which this could be done by the landlords was to raise it before the courts of England & Wales. In the context of this submission on behalf of Monsoon, the provisions of Articles 19, 20 and 32 of the Regulation are relevant.

Article 19

60. Article 19 sets out the governing principle relating to the recognition of the opening of insolvency proceedings in another Member State. In this context, the current author of *Goode on the Principles of Corporate Insolvency Law* (5th ed., 2019)

at para. 15 – 40 confirms that, in the case of a CVA, the proceedings are opened upon the CVA taking effect. Article 19 provides as follows:

> *"1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings….*
>
> *2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III".*

Article 20

61. In addition, the provisions of Article 20 should be noted. It addresses the effects of recognition of a judgment opening insolvency proceedings and provides as follows:

> *"1. The judgment opening insolvency proceedings as referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.*
>
> *2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent".*

62. For completeness, it should be noted that no secondary proceedings were ever opened under Article 3 (2) in this case and that accordingly the references to Article 3 (2) in Article 20 are not immediately relevant for present purposes.

Article 32

63. Counsel for Monsoon placed particular emphasis upon the provisions of Article 32 which addresses the recognition and enforceability of *"other judgments"*. The reference to *"other judgments"* relates to judgments other than those concerned with the opening of insolvency proceedings. Article 32 also expressly extends to cover compositions approved by the *"court"* which opens the main insolvency proceedings**.** Article 32 provides as follows:

> *"**Recognition and enforceability of other judgments***
>
> *1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012.*
>
> *The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.*
>
> *The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.*

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 of this Article shall be governed by Regulation (EU) No 1215/2012 provided that that Regulation is applicable".

Discussion and analysis of the issues which arise in respect of Article 32

64. Counsel for Monsoon submitted that the decision taken by the meetings of creditors of Monsoon to approve the CVA constituted a judgment which concerned the course and closure of the insolvency proceedings under the UK Insolvency Act and that it was also a *"composition"* approved by a *"court"* within the meaning of the Regulation. Counsel therefore submitted that the *"judgment"* fell within the clear terms of Article 32 (1) such that the court must recognise it without any further formality. In my view, this aspect of the argument made by counsel for Monsoon is correct. As noted in para. 37 above, the definition of *"court"* in Article 2 (6) (2) expressly extends not only to a judicial body but also to *"any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings".* This is also strongly reinforced by the provisions of Recital 20 (quoted in para. 38 above) which makes it very clear that insolvency proceedings do not necessarily involve the intervention of a judicial authority and that, accordingly, the term "*court*" should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. Annex A to the Regulation expressly provides that, in the case of the United Kingdom, voluntary arrangements under insolvency legislation (which would include the CVA) are to be taken as *"insolvency proceedings"* for the purposes of Article 2 (4). In this context, it seems to me that the following observation by the current author of *Goode on Principles of Corporate Insolvency Law* at para. 15-13 represents a correct statement of the law:

"As to CVAs, which do not involve the court at all except where an application is made under s. 4A of the Insolvency Act, it might appear hard to see how the conclusion of a CVA could be regarded as the opening of insolvency proceedings or how the participating creditors and members could collectively constitute 'the court'. But voluntary arrangements are included in the list of insolvency proceedings in Annex A, while the supervisor of a CVA features in the list of insolvency practitioners in Annex B, and these inclusions would be deprived of all meaning if the coming into force of a CVA were not to be treated as the opening of insolvency proceedings by a 'court' consisting of the parties to the CVA. In Re. Salvage Association Ltd, Blackburne J. held that the parties to a CVA did indeed constitute a 'court' for the purposes of the Regulation. By contrast, purely consensual restructurings (work-outs) fall outside the Regulation, as do schemes of arrangement falling within Pt 26 of the Companies Act, 2006 …".

65. In support of his submissions in relation to the significance of Article 32, counsel for Monsoon relied on a work by Bork & Van Zwieten namely their "Commentary on the European Insolvency Regulation" where the authors explain the effect of Article 32 (1) at paras. 32.10 to 32.12 as follows:

"32.10 Article 32 (1) sub-paragraph 1 provides for the recognition and enforcement of decisions by the court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19. … However, the difference between recognition according to Article 19 and recognition according to Article 32 (1) is practically irrelevant simply because both provisions provide for the same legal consequences; that is, an automatic recognition. For instance, certain limitations of creditors rights might either

be a legal consequence of the opening of the proceedings according to the lex fori concursus or may result from a (subsequent) court decision. Nevertheless, this is irrelevant, as in both cases such effects apply automatically and are only limited by the public policy exception under Article 33.

32.11 Article 32 (1) sub-paragraph 1 provides for a few demonstrative examples of judgments coming within the scope of these provisions: judgments concerning the course and closure of insolvency proceedings, and those for the approval of compensation arrangements. The scope of Article 32 (1) sub-paragraph 1, however, is not limited to these cases, although the wording 'course and closure' is extremely broad in any case. In addition, the exact delineation of the scope of Article 32 (1) sub-paragraph 1 is not important in practice, as its second sub-paragraph provides for a much broader scope for the application of these provisions' principles on the recognition and enforcement of judgment. …

32.12 The fact that Article 32 (1) refers to 'compositions approved by that court' might create the impression that only composition arrangements approved by a court are subject to recognition… This, however, would be wrong; on the contrary, all such arrangements in the widest sense need to be recognised under the Regulation, irrespective of whether they were approved or simply ordered by a court or whether they came into effect on the basis of a creditors' vote or agreement or simply because a reduction of debts is prescribed by law; the only relevant issue is whether such an arrangement or debt discharge is valid under the applicable lex fori concursus of proceedings falling within the scope of the [Regulation]".

66. Counsel for Monsoon argued that this passage provided strong support for his contention that the CVA and, in particular, the decision of the creditors to approve the CVA should be given automatic recognition in Ireland and that, if the landlords had wished to challenge the *vires* of the meetings of creditors to proceed in the way that they did, they ought to have brought an appropriate challenge before the courts of England & Wales. In this context, counsel referred to the decision of the CJEU in Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3854 where the CJEU stressed the obligation of mutual trust, in the context of the recognition of a judgment opening insolvency proceedings. In that case, an issue arose as to whether the High Court in Ireland or an Italian Court in Parma had jurisdiction to open main insolvency proceedings in respect of an Irish registered subsidiary of the Parmalat Group in Italy. At the time of the events in issue, the 2000 Regulation was in place. It contained, in Article 16 (1) a provision in substantially the same terms as Article 19 (1) of the Regulation under consideration in these proceedings.

67. In paras. 39-44 of its judgment, the CJEU stressed the importance of mutual recognition. In doing so, the CJEU referred, with some emphasis, to Recital 22 to the 2000 Regulation (which is now found in Recital 65 to the Recast Regulation which is quoted in para**.** 72 below). The CJEU said:

> *"39. As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16 (1) …, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust.*
>
> *40. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the*

[Brussels] Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules and recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of decisions handed down in the context of insolvency proceedings ….

41. It is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3 (1) of the Regulation, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process….

42. In return, as the 22nd recital of the Regulation makes clear, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction.

43. If an interested party, taking the view that the centre of the debtor's main interest is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.

44. The answer to the … question must therefore be that, on a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, the main insolvency proceedings opened by a court of a Member State must be

recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State".

68. Counsel for Monsoon drew attention, in particular, to the terms of paras. 43 and 44 of the judgment and he argued that, by analogy, a similar approach must be taken to the composition embodied in the CVA in the context of Article 32 (1) of the Regulation. As the extract from Bork & Van Zwieten (quoted in para. 65 above) suggests, the difference between recognition according to Article 19 (formerly Article 16 in the 2000 Regulation) and recognition according to Article 32 (1) is *"practically irrelevant simply because both provisions provide for the same legal consequences; that is, an automatic recognition".*

69. In response, counsel for the landlords submitted that the decision in *Eurofood* is relevant only to judgments opening main insolvency proceedings and in the specific context of the automatic recognition provisions contained in Article 19. In particular, he highlighted that, before a judgment can be made opening main insolvency proceedings, the court in question must examine, of its own motion, whether the centre of main interests of the insolvent debtor is within its jurisdiction. He stressed that, in contrast, subsequent decisions of the *"court"* which opened the main insolvency proceedings (which would include a decision to exercise the jurisdiction conferred by Article 11 (2)) do not contain any equivalent requirement. He noted that, in *Eurofood*, the CJEU expressly relied on Article 4 of the Regulation which provides that the court which is requested to open main insolvency proceedings is required, of its own motion, to examine whether it has jurisdiction pursuant to Article 3.

70. Counsel for the landlords also suggested, by reference to Recital 67 to the Regulation, that it creates an exception to the rule of automatic recognition. I do not accept this submission. As counsel for Monsoon correctly submitted, it is clear from

the context of Recitals 65 to 68 that the exception envisaged by Recital 67 is an exception to the general rule referred to in Recital 66 (namely that the law of the Member State of the opening of proceedings should be applicable to the insolvency proceedings). When Recitals 65 to 68 are read in sequence and in context, I believe that the submission made by counsel for Monsoon is correct. Recital 65 (quoted in para. 72 below) contains the crucially important principle that the recognition of judgments delivered by the courts of the Member States under the Regulation should be based on the principle of mutual trust. It is of some significance that this principle is not described in Recital 65 as a *"rule"*. The first reference to a *"rule"* in this context is in Recital 66. The latter sets out the general requirement as to the application of the law of the State of the opening of proceedings. In my view, it is very important to note that, here, in contradistinction to Recital 65, the requirement that the law of the Member State of the opening of proceedings should be applied is expressly described as a *"rule on conflict of laws"*. It is true that Recital 67 recognises that automatic recognition of insolvency proceedings to which the law of the State of the opening of proceedings normally applies may interfere with the rules under which certain transactions are carried out in other Member States. Counsel for the landlords argued, on this basis, that the exceptions subsequently described in Recital 67 must relate to the principle of automatic recognition. I do not believe that this argument is correct. On the contrary, it appears to me that the first sentence of Recital 67 does no more than recognise that, if Recital 65 and 66 stood on their own, this would have the capacity to interfere with the rules under which transactions are carried out in other Member States. This is entirely logical. As noted above, Regulation 65 requires that judgments should be recognised on the basis of mutual trust. In turn, the rule embodied in Recital 66 envisages that, unless otherwise stated,

the law of the Member State of the opening proceedings should be applicable. If those two principles were applied without exception, there would be no scope, at any stage, for the application of the law of any other Member State (save in the context of the public policy provisions discussed further below). In order to overcome this difficulty, Recital 67 provides that, in order to protect legitimate expectations and the certainty of transactions in other Member States, provision should be made for a number of exceptions to the "*general rule*". For the reasons outlined above, in my view, this is clearly a reference to the general rule envisaged by Recital 66 that the law of the Member State of the opening of proceedings should be applicable.

71. This conclusion is confirmed by a consideration of Recital 68 which expressly refers to one of the exceptions to the general rule as to the application of the law of the Member State of the opening of proceedings - namely rights *in rem.* Recital 68 therefore provides that, in the case of rights *in rem*, they should normally be determined according to the *lex situs.* They are accordingly an exception to the general rule envisaged by Recital 66.

72. That said, the reference in Recital 67 to the automatic recognition of insolvency proceedings is nonetheless important. It is consistent with Article 19 and Article 32 which, by their terms, expressly provide for automatic recognition. This is strongly reinforced by a consideration of Recital 65 which states:

> *"This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The*

recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court's decision".

73. While Recital 65 places specific emphasis on decisions to open proceedings, it is clear that the first part of the Recital is concerned with automatic recognition of judgments concerned not only with the opening of proceedings but also the conduct and closure of proceedings and of judgments handed down in direct connection with such proceedings. Recital 65 therefore extends to decisions such as that of the creditors here to approve the CVA.

74. However, counsel for the landlords not only argues that a distinction should be made between the recognition of judgments opening proceedings and other judgments, but he also submits that there is, in fact, no judgment by any *"court"* exercising the new jurisdiction available under Article 11 (2). For the purposes of this argument, he reiterated the submission (summarised in para 53 above) that Article 11 (2) is not an automatic jurisdiction but depends upon the satisfaction of what he described as the threshold conditions contained in paras. (a) and (b). He stressed that a court in which the main insolvency proceedings are opened (in this case the CVA) must act, under Article 11 (2) as a proxy for an Irish court. He argued that, as a matter of Irish law, the rights of the landlords could not have abrogated in the manner provided for in the CVA. As noted above, the case made by the landlords is that

examinership is the closest procedure available in this jurisdiction to a CVA and, under the 2014 Act, an arrangement with creditors in an examinership could not involve the imposition of a reduction in the amount of any rent reserved under a lease or a requirement that the lessor should not (in the event of non-payment of rent or a failure to comply with any other covenant or obligation of the lease) exercise any right to recover possession of the property the subject of the lease. He therefore argued that one of the essential preconditions to the operation of Article 11 (2) was not met in this case. Moreover, he argued that there is no material to be found anywhere in the CVA proposals which suggest that the creditors were ever asked to exercise any jurisdiction or competence under Article 11 (2). He submitted that the only competence which they assumed under the CVA proposals is an English law competence under Article 7. He therefore argued that there could be no question of the mutual trust principle applying to the "*decision"* embodied in the CVA insofar as Article 11 is concerned.

75. In the circumstances described in para. 74 above, counsel for the landlords argued that Article 11 (2) had never been applied as part of the CVA process. He accordingly argued that there is no judgment before the court on the Article 11 issue which requires to be recognised here. He submitted that, in circumstances where Article 11 (2) had not been applied, Article 11 (1) continues to apply such that the effect of the insolvency proceedings on the Cork and Dublin leases remains governed solely by the law of Ireland.

76. Counsel for the landlord also argued that, even if one were to treat the CVA proposals as a judgment exercising what he described as a *"mistaken competence under Article 11"* (which he suggested could not be the case because the creditors were never told anything about Article 11) it was impossible to conclude, even as a

matter of English law, that any aspect of the CVA could be characterised as a judgment arrived at under Article 11 (2). In simple terms, his argument was that, under Article 11 which has direct effect in the United Kingdom, English law must apply Irish law to the question as to the effects of the CVA on the Cork and Dublin leases. Counsel submitted that this was supported by the evidence given by the experts as to English law.

77. In the context of this submission, counsel for the landlords sought to rely on the *"extension principle"* under which, he submitted, the court has to decide whether or not there is before it a judgment capable of being recognised in Ireland. In referring to the extension principle, counsel made clear that he was referring to the manner in which the effect of a judgment in one Member State is extended to the whole territory covered by the Regulation. This was first articulated in the Virgos Schmidt report at para. 143 where the authors, in the course of their commentary on Article 17 of the Convention (now Article 20 of the Regulation) said:

> *"Article 17 lays down a model of recognition based on the extension of the effects of the judgment in a Contracting State to the whole territory covered by the Convention. Proceedings opened in another Contracting State will not, as regards their effects, be equated with national proceedings but will be recognised in other Contracting States with the same effects attributed to them by the law of the State of the opening (= 'extension model').*
>
> *The law of the State of the opening (and not the law of the requested State) shall be applicable to determine those effects. This shall apply to all the effects of the proceedings in another Contracting State, both procedural and substantive …. The substantive effects are included by virtue of the general applicability which the Convention attributes to the law of the state of the*

opening … and they are therefore subject to the same exceptions as are provided for by the Convention in respect of that law …".

78. In invoking the extension principle, counsel for the landlords submitted that, in accordance with well-established principles of EU law, the Regulation has direct effect in all parts of the United Kingdom and accordingly, insofar as the jurisdiction of England & Wales is concerned, forms part of English law. On that basis, he argued that, as a matter of English law, the CVA could not have the effect of interfering with the landlords' rights under the Cork and Dublin leases. His contention was that Article 11 (2) forms a directly applicable provision of English law which had not been applied during the CVA process. The failure to exercise competence under Article 11 (2) has the effect (so counsel argued) that, as a matter of English law, the CVA could not, in circumstances where the creditors never purported to exercise a competence under Article 11 (2), have the lawful effect of modifying the leases in the manner set out in the terms of the CVA. Counsel argued that, accordingly, under the extension principle, the CVA (insofar as it purports to adversely affect the landlord's rights under the Cork and Dublin leases) could never be effective and recognised in Ireland. It would only be required to be recognised in Ireland, under the extension principle, where the CVA was effective, as a matter of English law, to modify the leases. Counsel suggested that this proposition was supported by the evidence given by Mr. Briggs (the English law expert who provided affidavit evidence and reports on behalf of Monsoon) where, in his first report, Mr. Briggs noted the decision of Norris J. in *Discovery (Northampton) Ltd v. Debenhams Retail Ltd* [2020] EWHC 260 (Ch). In that case, Norris J. deleted certain provisions of a CVA which he held were, as a matter of English law, unlawful notwithstanding that the CVA had been approved by the requisite majority of creditors. Counsel for the landlords, by analogy, argued that

any provisions of the CVA in this case which are contrary to English law, should likewise be treated as though they had been deleted from the CVA. Counsel submitted that the clauses of the CVA that were inconsistent with Irish law must also be treated as contrary to English law given the effect of Article 11 in English law.

79. Counsel also drew attention to what was said by Mr. Smith Q.C. in paras. 47 to 48 of his first report in which he suggested that the relevant parts of the CVA which exceed the jurisdiction provided for in Article 11 (2) are invalid and ineffective. In those paragraphs, Mr. Smith also said that a challenge to the CVA in the English courts on the grounds that the creditors meeting had no jurisdiction under Article 11 to terminate or modify contracts relating to the use of a moveable property located in Ireland would not fall within the concept of unfair prejudice or material irregularity under s. 6 of the UK Insolvency Act. Mr. Smith added:

> *"…to the extent that such a challenge was brought before the English courts, it would be brought by way of a claim or application for a declaration that the relevant parts of the CVA exceed the jurisdiction provided for by Article 11 and to that extent are invalid and ineffective. I should add, for the avoidance of doubt, that I do not consider that as a matter of English law the English court would have exclusive jurisdiction in relation to such a claim or application for a declaration. In particular, there is in my opinion as a matter of English law no reason why such a claim or application would not be brought in the forum where the relevant real property was situate".*

80. There was a significant difference of opinion between Mr. Smith and Mr. Briggs (who provided a witness statement and reports on behalf of Monsoon) as to whether a challenge could be brought in the courts of England & Wales under s. 6 of the UK Insolvency Act or under the ordinary jurisdiction of the courts of England &

Wales. While Mr. Briggs had initially suggested that only declaratory proceedings could be brought under the ordinary jurisdiction of the English courts, he subsequently concluded that it would have been open to the landlords to challenge the CVA under s. 6 of the UK Insolvency Act and he later expressed the view that a s. 6 application was the only route available to the landlords by which to mount a challenge to the CVA on the ground that the relevant parts of the CVA exceed the jurisdiction provided under Article 11. He further expressed the opinion that the failure of the landlords to challenge the CVA under s. 6 now has the consequence that the CVA is binding upon the landlords under the *"statutory contract"* principle (described in paras. 24 to 26 above) under which even dissentients and non-voting creditors are bound by the outcome of a majority vote in favour of a CVA.

The effect of the obligation imposed by Article 32 to recognise the CVA

81. While I fully acknowledge the ingenuity of the argument made by counsel on behalf of the landlords, I believe it is very difficult to reconcile his argument with the express requirement placed on this court under Article 32. As noted in para. 64 above, I have come to the conclusion that the approval of the CVA constitutes a judgment *"handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19"* and which concerns a composition approved by that *"court"* such that it falls within Article 32.1 of the Regulation. In accordance with the obligation of mutual trust, it is therefore a judgment which, subject to the public policy exception contained in Article 33 (addressed below) must be recognised in all of the Member States. While I fully accept that the judgment of the CJEU in *Eurofood* was concerned with recognition of a judgment opening insolvency proceedings, the judgment makes very clear that the obligation of mutual trust requires the courts of the Member States to recognise and

give effect to the judgment of the court which opened the main insolvency proceedings. I recognise that there are elements of the *Eurofood* decision which can be distinguished. In particular, I recognise and accept that, in its judgment in that case, the CJEU referred to the obligation which is specifically placed on the court proposing to open main insolvency proceedings to examine, on its own motion, whether it has jurisdiction to do so. There is no equivalent requirement in the case of judgments which fall within the ambit of Article 32. I also appreciate that, in the case of a judgment opening main proceedings, Article 5 expressly provides that a creditor must have the right to challenge that decision in the courts of the jurisdiction in which main insolvency proceedings were opened. There is no equivalent provision in the case of a judgment falling within the ambit of Article 32. While I acknowledge these points of distinction, I am not persuaded that they allow me to conclude that I am at liberty to look behind a judgment of a court of another Member State and to consider whether, as a matter of the law of that Member State, the judgment is or is not effective. That seems to me to be entirely contrary to the obligation of recognition imposed by Article 32. The present case illustrates the difficulties that would arise if a court were to embark on an inquiry of that kind. In this case, in the respective opinions presented by Mr. Smith on the one hand (on behalf of the landlords) and Mr. Briggs, on the other hand, on behalf of Monsoon, there has been a lively debate as to various aspects of English law. Where such disputes arise, that places the court in the invidious position of having to decide for itself what is the true effect of the law of the jurisdiction in which main insolvency proceedings were issued. Such an exercise seems to me to be antithetical to the obligation imposed under Article 32 to recognise the judgment with no further formalities.

82. I must bear in mind that, as Bork & Van Zwieten observe, in para. 32.10 of their commentary (quoted in para. 65 above) the difference between recognition according to Article 19 and recognition according to Article 32 (1) is practically irrelevant *"simply because both provisions provide for the same legal consequences; that is, an automatic recognition".* The observation made by Bork & Van Zwieten is consistent with the plain words of Article 32 (1). The obligation of recognition imposed by Article 32 (1) is in very similar terms to Article 20 (1) dealing with judgments opening main insolvency proceedings. The requirement is to recognise the judgment. Article 20 provides that such a judgment will *"with no further formalities produce the same effects in any other Member State as under the law of the State of the opening of proceedings, unless this Regulation provides otherwise…".* In the case of Article 32 (1), the judgment is to be recognised *"with no further formalities".* The obligation to recognise the latter is also reinforced by the requirement also expressly contained in Article 32 (1) that judgments within the ambit of Article 32 (1) are to be enforced in accordance with Articles 39 to 44 and 47 to 57 of the Brussels I Recast Regulation.

83. Furthermore, it seems to me to be a necessary consequence of the obligation to recognise a judgment of a court of another Member State with no further formalities, that any challenge to be made to the validity of that judgment must be made in the jurisdiction in which it was given. Otherwise, the obligation to recognise the judgment would be deprived of its intended effect. Rather than giving recognition to the judgment without formalities, it would involve this court undertaking an inquiry as to the true effect of the judgment in question according to the law of the State in which it was given. In my view, that would entirely undermine the object and effect of Article 32.

84. In my view, the position under the Regulation is the same as the position which exists under the Brussels I Recast Regulation. Article 32.1 expressly incorporates specific aspects of the Brussels I regime. It is clear from the case law of the CJEU that a perceived failure to apply national law or EU law is not a ground on which to refuse recognition. In the context of the earlier Brussels Convention, the CJEU stated as follows in Case C-38/98 *Renault v. Maxicar* [2000] ECR I-2973 at para. 33:

> *"The court of the State in which enforcement is sought cannot, without undermining the aim of the Convention, refuse recognition of a decision emanating from another Contracting State solely on the ground that it considers that National or Community law was misapplied in that decision. On the contrary, it must be considered whether, in such cases, the system of legal remedies in each Contracting State, together with the preliminary ruling procedure provided for in Article 177 of the Treaty, affords a sufficient guarantee to individuals".*

85. This approach is strongly reinforced by the provisions of Article 52 of the Brussels I Recast Regulation (which is expressly applied by Article 32 (1) of the Recast Insolvency Regulation). Article 52 of the Brussels I Recast Regulation provides that *"under no circumstances"* may a judgment given in a Member State be reviewed as to its substance in another Member State. I note, however, that in *Goode*, it is suggested by the author at para. 15-34 that:

> *"In exceptional cases the court of a Member State may be entitled to disregard a judgment of a court of another Member State. Where, for example, the court of the other State has assumed jurisdiction despite an express finding that the debtor's COMI is not situated within that State, it must, it is thought, be open*

to a court entertaining subsequent proceedings elsewhere to disregard the earlier decision as ultra vires the Regulation on its face…."

86. No authority for that proposition is cited by the author of *Goode.* Nonetheless, it might be said that, in the present case, in light of the letter from Shoosmiths quoted in para. 18 above that a parallel situation arises here. In that letter, Shoosmiths clearly suggested that Article 11 was trumped by Article 7 (2) and gave the clear impression that the meeting of creditors convened to consider and vote on the CVA would proceed on that basis. There is nothing in the CVA itself to suggest otherwise. In those circumstances, an argument arises as to whether the opinion expressed by the author of *Goode* gives rise to an arguable basis to suggest that the decision of the creditors to approve the CVA is *ultra vires* the Regulation on its face. Obviously, if that was a permissible course to take, it would not involve any review of English law and would not necessarily give rise to the same level of concern as that expressed by me in para. 81 above. That said, in circumstances where no authority for the proposition is given, and where no case to that effect has been brought to my attention, I do not believe that I could safely conclude that such an approach could lawfully be taken by this court. In such circumstances, it might be suggested that a reference should be made to the CJEU for definitive guidance on the issue. I find it difficult to see any proper basis to do so. Moreover, before considering whether a reference might be appropriate, I would need to consider whether EU law is already clear on the issue. In this context, notwithstanding the great respect in which the current author of *Goode* is held, the approach taken by the CJEU in the *Maxicar* case strongly suggests that the statement made by the author is incorrect and should be discounted. In addition, such a reference would only be appropriate, of course, if a decision on that issue was necessary in order to reach a decision on the proceedings

before me. Depending upon the view I take in relation to the next issue to be decided (relating to the public policy provisions contained in Article 33) it may not be necessary for me to give any further consideration as to whether there is any sufficient basis to make such a reference. It is therefore appropriate that I should first address the public policy argument made on behalf of the landlords.

The public policy exception under Article 33

87. Article 33, by way of an exception to the rule of automatic recognition contained in Article 32 (and the equivalent rules relating to judgments opening insolvency proceedings contained in Articles 19 and 20), envisages that a Member State may refuse to recognise insolvency proceedings or to enforce a judgment where, to do so, would be very clearly contrary to the public policy of that Member State. Article 33 provides as follows:

> *"Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual".*

88. It is clear from the case law of the CJEU and from the decision of Finlay Geoghegan J. in *Fairfield Sentry Ltd (in liquidation) v. Citco Bank Nederland* [2012] IEHC 81 that Article 33 can be invoked only in very exceptional circumstances. As the CJEU made clear in Case C-7/98 *Krombach v. Bamberski* [2000] ECR I - 01935 that recourse to Article 33 can be envisaged *"only where recognition or enforcement of the judgment … would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch* as *it would infringe a*

fundamental principle." The CJEU emphasised in that case that the infringement of the national fundamental principle of the recognising State would have to constitute a *"manifest breach of a rule of law regarded as essential in the legal order"* of the recognising State.

89. Bork & Mangano, at paras. 5.42 to 5.54, provide a very helpful commentary on Article 33. In the first place, consistent with the case law of the CJEU (both with regard to the Regulation and the Brussels I regime) Bork & Mangano highlight that Article 33 is to be applied restrictively. At para. 5.43 they observe:

> *"Art. 33 constitutes the only basis upon which recognition can be refused…. The Regulation operates under the assumption that recognition is desirable and is based upon the principles of mutual trust; therefore, the scope for refusal of recognition should be as small as possible. Thus, the public policy exception is subject to* ***strict interpretation*** *and should only be invoked in extreme circumstances; this can be derived from the wording of Art. 33, as it requires the effects of recognition to be manifestly contrary to the recognising Member State's public policy"* (emphasis in original)

90. The CJEU has emphasised that Article 33 is reserved for exceptional cases. In *Eurofood*, the CJEU, in the context of the 2000 Regulation (in which Article 26 corresponded with Article 33 of the Regulation) emphasised that the same approach should be taken in the context of the public policy exception to that previously taken in the case law relating to the public policy exception contained in Article 27 (1) of the Brussels I Convention (as it then was). At paras. 61 to 64 of its judgment, the CJEU said:

> *"61. Whilst the 22nd recital of the Regulation infers from the principle of mutual trust that 'grounds for non-recognition should be reduced to the*

minimum necessary', Article 26 provides that a Member State may refuse to recognise insolvency proceedings opened in another Member State where the effects of such recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

62. In the context of the Brussels Convention, the Court … has held that, since it constitutes an obstacle to the achievement of one of the fundamental aims of that Convention, namely to facilitate the free movement of judgments, recourse to the public policy clause contained in Article 27, point 1, of the Convention is reserved for exceptional cases (Case C-7/98 Krombach [2000] ECR I-1935, paragraphs 19 and 21).

63. … the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State, the Court … had held, in the context of the Brussels Convention, that recourse to that clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (Krombach, paragraphs 23 and 37).

64. That case-law is transposable to the interpretation of Article 26 of the Regulation".

91. Bork & Mangano draw attention to the lack of detail in Article 33 as to the nature of public policy violations that will be regarded as falling within its ambit. However, they suggest that it is possible to identify a number of situations which will not attract its application. Thus, for example, they observe, at para. 5.48 that *"no violation of public policy is to be assumed if a court has wrongfully asserted jurisdiction".* They explain that this follows from the principle of mutual trust. They say:

> *"Since the principle of mutual trust prohibits any Member State from reviewing a claim to have jurisdiction made by the court of another Member State, the competence of a court cannot constitute part of the fundamental policies of Member States. Therefore, jurisdiction of the court cannot be scrutinised for the purposes of Art. 33. Whether this principle also applies to cases in which jurisdiction has been obtained through deception or through manoeuvres to shift the COMI to a more favourable Member State … is debatable".*

92. The same point is made by Bork & Van Zwieten at para. 33.14 where they say:

> *"… the public policy clause must not be abused in order to second-guess a court's decision relating to its jurisdiction to open main proceedings. In particular, as is the case with the Brussels I Regulation, the mere fact that the court of another Member State is of the opinion that the decision of the court having opened such main proceedings was incorrect with respect to jurisdiction is no ground for the refusal of the recognition of the decision opening the proceedings according to Article 33".*

93. Counsel for the landlords argued that the decision to approve the CVA without applying Irish law constituted a *"wilful and blatant disregard of Irish law"* such as to attract the application of the public policy exception. In substance, this was a repeat of the argument previously made by counsel that there had been a failure in the course of the CVA process to apply Irish law as required by Article 11 (2). Having regard to the obligation of mutual trust (discussed at length in the previous section of this judgment) I do not believe that this is an argument which can be pursued under Article 33. Bork & Mangano support this conclusion. As Bork & Mangano say at para. 5.49:

> *"It follows from the … principle of mutual trust that authorities in the recognising Member State cannot invoke the public policy exception in order to scrutinise the judgment in question on its merits.* ***Since the public policy exception requires that the effects of recognition violate the recognising Member State's fundamental principles, it is irrelevant whether or not the issuing court correctly applied the rules of the [Regulation] or the applicable national insolvency law. Consequently, the ability to undertake a revision au fond is not granted by Art. 33".*** (emphasis added).

94. Bork & Mangano helpfully explain the circumstances in which Article 33 may properly arise. At para. 5.50, they say:

> *"Infringement of a Member State's public policy seems possible only in cases in which the effects of the judgment originate from a scheme of insolvency law other than that of the recognising Member State. Since the Member States agreed upon the provisions of the [Regulation], it seems highly unlikely that effects resulting from the application of the [Regulation] would contravene any Member State's public policy. Likewise, any effects resulting from the*

application of a Member State's own insolvency law cannot run contrary to that Member State's public policy. A breach of public policy of the recognising Member State may therefore be assumed only when the effect in question stems from foreign national insolvency law and when this effect differs from effects invoked by domestic insolvency law of the recognising Member State. This difference must relate to a fundamental principle of the recognising Member State".

95. Bork & Mangano also explain, at para. 5.51, that it follows from the wording of Article 33, that the public policy of a Member State encompasses both the rights and liberties of the individual (which they describe as *"subjective rights"*) as well as objective values namely fundamental principles. Because Article 33 is not limited in its application to the rights and liberties of the individual, and expressly extends to fundamental principles, Bork & Mangano express the view that the use of the public policy exception to deny recognition *"does not necessarily require infringement of the rights of participants in the insolvency proceedings. Authorities of the recognising State are directed to test ex officio whether the effects of the judgment constituted an infringement of public policy of the recognising State".*

96. As the decision in the *Eurofood* case illustrates, the public policy exception contained in Article 33 may be invoked not only in the context of the substantive law of a Member State but also in the context of the procedural rights of participants in the insolvency proceedings. Thus, as Bork & Mangano observe, at para. 5.52, it may be necessary to examine whether the judgment in question is the result of a procedure which does not comply with the fundamental procedural guarantees of the recognising Member State. At para. 5.53, the authors suggest that infringement of the procedural public policy of a Member State may arise:

"... if participants are not informed of the opening of proceedings, do not receive documents which are crucial to proceedings, are not heard, and/or are denied participation within proceedings. However, we must bear in mind that insolvency proceedings involve a number of participants with diverse (procedural) interests and rights regarding the different judgments handed down in the course of the proceedings. While it seems obvious that the debtor must be heard, prior to the judgment opening insolvency proceedings the same might not be said regarding creditors. Furthermore, the right to a fair trial may be guaranteed in different ways by different Member States. The urgency of certain judgments, such as judgments concerning preservation measures, may justify the right to be heard simply constituting a route for legal appeal. To determine whether a breach of public policy should be assumed, it is therefore necessary to define whose procedural rights are in question, which procedural rights should have been respected and whether those rights were denied in the course of proceedings. Even if procedural rights which should have been respected were denied during proceedings, Article 34 (2) of the Brussels I Regulation suggests that no violation of public policy is to be assumed if the participant in question failed to challenge the judgment when it was possible for him to do so".

97. Bork & Van Zwieten also suggest that, in the context of procedural fairness, it is sufficient that there is an ability on the part of the objecting party to appeal or seek judicial review. At para. 33.14, they suggest:

"... moreover, the right to be heard need not be granted to all creditors in advance. It is sufficient that a party can raise the possibility of recourse to

judicial review of the decision to open main proceedings according to Article 5".

The case made by the Irish landlords under Article 33

98. The above observations are very relevant in the context of the arguments made by counsel on behalf of the landlords here. In this case, in addition to the argument mentioned in para**.** 93 above, counsel for the landlords also makes two additional arguments (one relating to the substantive law of Ireland and the other relating to procedural fairness):

(a) In the first place, counsel argues that the *"decision"* to approve the CVA is contrary to fundamental principles and the constitutional rights and liberties of the Irish landlords insofar as it purports to modify Irish lease obligations which are constitutionally protected as property rights under Article 40.3 of the Constitution without any judicial intervention or hearing of any kind; and

(b) Secondly, counsel argues that the procedure adopted in this case was inherently unfair in that the *"decision"* adopted to approve the CVA was rendered by a single vote of a meeting of creditors which did not admit of anything other than a creditor voting yes or no. No aspect of the process involved a consideration of individual rights and interests of any individual creditor and in particular of the individual rights of the landlords under Irish law which ought to have been respected under Article 11 of the Regulation. In response to this argument, counsel for Monsoon relies strongly on the availability, under English law, of a right to apply to the English courts under s. 6 of the UK Insolvency Act.

The procedural fairness issue

99. In my view, it makes sense to address the procedural fairness argument first. If the landlords succeed in relation to the procedural fairness argument, it may be wholly unnecessary to consider the argument based on substantive Irish constitutional law. It seems to me that the substantive constitutional law argument should only be addressed if absolutely necessary. My concern is that, if I were to hold that the outcome of the CVA process infringes substantive Irish constitutional law, this could have significant repercussions for the enforcement and recognition of other CVAs in analogous circumstances. In saying that, I do not wish in any way to suggest that the outcome of the CVA process is necessarily infirm based on Irish substantive constitutional law principles. I am very conscious of the case made by Monsoon that the landlords will fare better under the CVA than in a liquidation. Nonetheless, I believe it is preferable to avoid addressing any issue as to substantive constitutional law (as opposed to constitutional law relating to procedural fairness) unless absolutely necessary to do so. In this context, I am mindful that, if a determination is reached on procedural fairness, any defect in the procedure adopted in the CVA process here can, I am sure, be readily remedied in any future CVA process in the United Kingdom involving Irish leases.

100. In my view, the procedural fairness argument requires consideration of two interrelated issues namely:

(a) Whether counsel for the landlords is correct in suggesting that there was a sufficiently serious breach of procedural fairness to potentially engage the application of Article 33; and

(b) If so, whether counsel for Monsoon is correct that the availability of a court challenge is sufficient to cure any unfairness at the level of the CVA process.

101. In the context of the public policy issue, questions of procedural fairness require some understanding of the nature of the landlords' substantive rights and the protection afforded to them under the Constitution. The fundamental rights recognised by the Constitution are set out in Articles 40 to 44 of the Constitution. Article 40.3 and Article 43 are of particular relevance in the present context. Article 40.3 provides as follows:

> *"3 1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
>
> *2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen".*

102. This guarantee to protect property rights from unjust attack must be read in conjunction with Article 43 which, insofar as relevant, provides as follows:

> *"1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods…".*

103. The provisions of Article 40.3 and 43 very clearly identify the extent to which the protection of property rights is enshrined in the Constitution. There is no doubt that the rights of a lessor constitute a species of property rights which is protected by the Constitution. This is illustrated by the approach taken by Hogan J. (as he then was) in *Albion Properties Ltd v. Moonblast Ltd* [2011] 3 I.R. 563 at p.p. 570-571 where, in the context of a landlord's right to pursue a defaulting tenant, he said:

> *"…I entirely agree with the submission of counsel for the plaintiff that it would be pointless to require his client to issue separate … proceedings …. A requirement of this kind would simply represent legal formalism at its worst.*

Any supposed jurisdictional bar which prevented the court from granting injunctive relief in an appropriate case to require a defaulting tenant to yield up possession of a commercial tenancy would be at odds with the duty imposed on the courts by Article 40.3.2 of the Constitution to ensure that the property rights of the plaintiff are appropriately vindicated in the case of injustice done. The courts are under a clear constitutional duty to ensure that the remedies available to protect and vindicate these rights are real and effective …. For good measure, a similar obligation is imposed on the State by article 13 of the European Convention on Human Rights 1950…".

104. The extent to which the property rights of lessors are protected is also reflected in the provisions of s. 544 (1) of the 2014 Act (discussed in para. 55 above). In enacting s. 544, the legislature was clearly concerned to ensure that a scheme of arrangement in an examinership should not infringe such property rights. The Constitution does not, however, outlaw or out rule all interferences with property rights. Objectively justified and proportionate interference with property rights are permitted. However, any such interference must also involve fair procedures. This is illustrated by the decision of the Supreme Court in *Dellway Investments v. National Asset Management Agency* [2011] 4 I.R. 1. That case concerned the exercise of powers conferred on the National Asset Management Agency (*"NAMA")* by the National Asset Management Agency Act, 2009 (*"the 2009 Act").* The aim of the statutory scheme created by the 2009 Act was to transfer bank loans of systemic significance (with their associated security) to NAMA, a state body, which would work out those loans in an orderly fashion. The plaintiffs in those proceedings were borrowers who had provided security to a financial institution whose loan book and related security were required by NAMA under the 2009 Act. The plaintiffs were very

concerned by the acquisition of their loans and security by NAMA who they feared would act quite differently to the original lenders. Among the arguments made by the plaintiffs in those proceedings was that they had an entitlement to be heard in advance of the acquisition of their loans by NAMA based on the significant impact that such acquisition would have on their property rights in the remaining equity of redemption which they held in the underlying security. They argued that there had been a failure to give them such advance notice. This argument was unanimously upheld by the Supreme Court. At p.p. 296-297, Hardiman J. said:

> *"It is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears. He is also, very probably, entitled to reasons for the decision taken, if any. A finding that Mr. McKillen is entitled to be heard in the present case naturally imports these necessary consequences of the existence of that right. I do not see in the circumstances of the present case a positive need for an oral hearing, though NAMA's obligations may of course be met in that way. I would not otherwise prescribe the nature of the hearing, which will ultimately depend on the circumstances of the individual case. The basic incidents of a hearing are well covered in familiar textbooks and well known decisions …".*

105. In the same case, Fennelly J. said at p. 328:

> "*The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons*

why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard…".

106. The upshot of the decision of the Supreme Court in that case was that, notwithstanding that the 2009 Act made no provision requiring NAMA to afford a borrower affected by a proposed course of action on its part to make representations in advance, the 2009 Act had to be construed in a constitutional fashion in accordance with the principles laid down by the Supreme Court in *East Donegal Co-Operative Livestock Mart Ltd v. The Attorney General* [1970] I.R. 317. Under the latter decision, to the extent possible, legislation enacted since the adoption of the Constitution in 1937 must be interpreted in a manner consistent with the Constitution and this extends to the procedures to be followed under the legislation. In my view, the approach taken by the Supreme Court in *Dellway* very plainly establishes that it is a fundamental principle of Irish constitutional law that, before a decision is taken which has the potential to interfere with constitutionally protected property rights, the party whose rights are in issue must be given an opportunity to make representations. For that purpose, it makes no difference whether the person concerned is a human person or a corporate body such as the Cork and Dublin landlords. As Fennelly J. observed in *Re. Eurofood IFSC Ltd* [2004] 4 I.R. 370 at p.p. 419-420 these rights apply to both corporate bodies and private individuals. In the same passage, Fennelly J. also identified that this principle is of cardinal importance, as a matter of public policy, in Irish law. He said:

"The task of this Court … is to decide whether recognition of the decision of the Italian court would be contrary to Irish public policy. The provisions of Article 26 of the Regulation are matters of Community law. Insofar as the decision of this Court involves an interpretation of that article, the Court will

be obliged to refer any such question for preliminary ruling to the [CJEU]. However, it is for this court to decide the issue of Irish public policy. It is only if it comes to the conclusion that the decision of the Parma Court should not, as matter of Irish public policy, be recognised that it will need to consult the Court of Justice….

The principle of fair procedures in all judicial and administrative proceedings is, in Irish law, a principle of public policy of cardinal importance. It derives both from the rules of natural justice of the common law and from constitutional guarantees of personal and individual rights.

The dictum of Gannon J. as to the scope of this fundamental principle, in the State (Healy) v Donoghue [1976] I.R. 325, at page 335, has been repeatedly approved. It is:

> *'Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence'.*

These principles apply to all forms of proceedings, civil and criminal. In an appropriate case, they may be invoked both by bodies corporate and by non-citizens…".

107. In light of the principles which emerge from the case law just discussed, it is clear that the right to be heard before property rights are interfered with is a fundamental principle of Irish constitutional law and is therefore capable of attracting the application of Article 33. That said, the approach taken by the Supreme Court in *Eurofood* must be read in conjunction with the subsequent decision of the CJEU following the preliminary reference made to it by the Supreme Court. In that case, the CJEU added the qualification quoted below to the judgment of Fennelly J. That qualification should be seen in against the backdrop of the facts of that case. There, the complaint was that the provisional liquidator appointed by the High Court in Ireland had not been given copies of documents necessary to enable him to participate in and appropriately deal with the proceedings before the court in Parma. In giving the judgment of the Supreme Court here, Fennelly J. had held that there had been a failure to afford a hearing to the provisional liquidator. The CJEU added a qualification to that finding in the following terms in paras. 66 to 68 of its judgment:

"66. Concerning … the right to be notified of procedural documents and, more generally, the right to be heard… these rights occupy an eminent position in the organisation and conduct of a fair legal process. In the context of insolvency proceedings, the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, any restriction on the exercise of that right must be

duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency.

67. In the light of those considerations, … on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

68. Should occasion arise, it will be for the referring court to establish whether, in the main proceedings, that has been the case with the conduct of the proceedings before the Tribunale civile e penale di Parma. In that respect, it should be observed that the referring court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard".

108. Thus, as a matter of EU law, the right to be heard does not necessarily require that there should be an oral hearing of any representations to be made by a party affected by a decision to be made by the relevant *"court"* in the State where main insolvency proceedings have been opened. What is crucial is that the party affected must be given a sufficient opportunity to make representations. In the present case, counsel for the landlords strongly argues that this opportunity was not given to the

landlords in the process that was adopted in the course of the decision to approve the CVA at the creditors' meeting which took place on 3rd July, 2019 in London. This contention on the part of the landlords was vehemently refuted by counsel for Monsoon who submitted that the landlords had every opportunity to attend the creditors' meeting and to make representations to it. They had received notice of the meeting and could readily have turned up and made appropriate representations to the meeting.

109. I have to say that I was initially inclined to the view that the submission made by counsel for Monsoon must be correct. However, on further reflection, I have come to the conclusion that it does not withstand scrutiny. It seems to me that the response of counsel for the landlords is correct. Counsel for the landlords, submitted that there was no reality to the argument made on behalf of Monsoon. He pointed out that, as appears from the evidence of Mr. Smith QC, a meeting of this kind will usually be dominated by proxies who have already given authority to the chairman to vote on the resolution to vote either *"yes"* or "*no"* on the resolution. That submission seems to me to be correct. A consideration of the report provided by the chairman of the meeting, Mr. Wormleighton, illustrates that the only resolution that was tabled for the meeting was the resolution *"for the acceptance of the proposed voluntary arrangement as circulated".* Mr. Smith's evidence in relation to the use of pre-signed proxies is unsurprising. I believe it is fair to say, from my own experience of class meetings on schemes of arrangement under the Companies Act, 2014 and its predecessor legislation, that the outcome of such meetings are frequently decided by proxies furnished to the chairman in advance in which the vote to accept or reject the proposal has already been cast. However, as described further below, a decision made by the creditors at such a meeting does not automatically bind a dissenting minority.

Under Irish law, such a scheme requires to be confirmed by the court before it has legal effect.

110. For completeness, it is important to note that, as a matter of Irish law, it is possible to vary the rights of creditors of a debtor company by means of a scheme of arrangement under s. 450 of the 2014 Act or by means of a scheme of arrangement in an examinership. However, in both of those cases, the position of creditors is protected in two ways. In the first place, in voting on such a scheme, the creditors will be grouped into appropriate classes. Secondly, and very importantly, both such schemes require court confirmation.

111. Insofar as the separation of creditors into appropriate classes are concerned, the Irish courts, as the judgment of Laffoy J. in *Re. Millstream Recycling Ltd* [2010] 4 I.R. 253 confirms, have consistently followed the approach taken in *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q.B. 573 where Bowen L.J. said at p. 583:

> *"It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest".*

112. By separating classes in that way, conflicts of interest are avoided and, in the words of Bowen L.J. in the *Sovereign Life Assurance* case, at p. 583, it is also possible *"not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority".* The separation of creditors into classes thus provides the first layer of protection for creditors.

113. In the case of both schemes of arrangement under s. 450 of the 2014 Act and schemes of arrangement in an examinership, the next layer of protection available for creditors is that the scheme will not have legal effect unless confirmed by the court. Creditors have a right to be heard before the court confirms the scheme. In addition, as Clarke J. (as he then was) noted in *McInerney Homes Ltd* [2011] IEHC 4 at p. 6, the case law with regard to what is now s. 450 makes clear that, although there is no statutory test to this effect, the court will consider (*inter alia*) the fairness and equity of a proposed scheme in determining whether it should be approved. Similar observations were made by Kelly J. (as he then was) in *Re. Colonia Insurance (Ireland) Ltd* [2005] 1 I.R. 497. As noted above, any dissenting creditor will be given an opportunity to be heard. In that way, the constitutional rights of any of the creditors of the company will be appropriately vindicated and protected. As Murnaghan J. observed in the Supreme Court in *Re. John Power & Son* [1934] I.R. 412 at p. 432:

> *"The compromise or arrangement which can only be made binding against the wishes of the dissentient shareholders… requires the sanction of the court. In my opinion the court under this section can give all due weight to the opinion of the majority of the shareholders but the court is in no way bound merely to register the opinion of this majority. The sanction to be given by the court must be a real sanction, and to my mind the meaning of the section clearly is that no majority under the section can carry an arrangement which a fair and impartial mind would not sanction".*

114. Similarly, insofar as schemes of arrangement in examinerships are concerned, the court is expressly enjoined by s. 541 (4) from confirming any such scheme unless (a) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted them, (b) the court is satisfied that the

proposals are fair and equitable in relation to any class that has not accepted the proposals (and whose interests or claims would be impaired by them) and (c) that the proposals are not unfairly prejudicial to the interests of any interested party. Again, the creditors have a right to be heard on any application to confirm a scheme. As a consequence of the approach which is taken, the constitutional rights of any interested party (including the right to be make representations before an adverse decision is made) will be appropriately vindicated and protected.

115. In the context of examinerships, the landlords have placed particular emphasis upon the provisions of s. 544 of the 2014 Act which imposes additional limitations on the court's power when it comes to a scheme of arrangement that purports to modify leases. In my view, counsel for the landlords was correct to suggest that this provision is clearly concerned to ensure that constitutional property rights are adequately protected in the context of an examinership. That said, it must be acknowledged that under s. 537 of the 2014 Act, it is possible for an application to be made to the court to repudiate an onerous contract such as a lease. Such applications have been made from time to time. However, no such application could be made without giving the relevant landlord an opportunity to be heard. Furthermore, the involvement of the court ensures that the constitutional rights of the landlords will be respected.

116. Thus, although Irish law clearly envisages that the rights of creditors and leaseholders can be modified, there are inbuilt mechanisms available in the law to ensure that constitutional rights are properly respected and that procedures are adopted which are fair and which protect such rights.

The failure to give the Irish landlords an opportunity to be heard before the votes of creditors were cast

117. In contrast, the arrangements that were put in place in relation to the CVA process here made no provision to address the particular issue which arose in relation to the Irish leases and the manner in which the CVA purported to vary those leases. For the reasons outlined in paras. 101-107 above, there can be no doubt that it is a fundamental public policy that persons in the position of the Irish landlords here should have been given an opportunity to be heard in relation to the changes which the CVA proposed to be made to obligations and rights of the parties under the Irish leases. Those changes have significantly interfered with the existing constitutionally protected rights of the landlords. Given that the leases are governed by Irish law and given the requirements of Article 11 (2) of the Regulation, the opportunity to be heard should have extended to give the Irish landlords the facility to bring the provisions of Irish law (including Irish constitutional law) to the attention of all of the creditors who intended to vote on the CVA. While counsel for Monsoon argued that the landlords could have turned up to the meeting and made their representations, the manner in which the meeting was convened and organised did not provide for this. A consideration of the chairman's report makes this very clear. There was no element of the procedure that was adopted in this case which provided a mechanism for the making of representations by the Irish landlords to all of the creditors who would ultimately be voting at the meeting (whether in person or in proxy). That is something that would have had to be flagged in advance so that the body of creditors as a whole would have known that it was something on which their views would be required. I have no doubt that it must have been possible to address the issue appropriately. For example, I note from para. 6 of the chairman's report, that, prior to the meeting, a number of drafting clarifications in relation to the proposals had been

placed on a web portal for the attention of all creditors. It strikes me that the creditors could also have been informed in advance by similar means of any proposal to allow representations to be made by landlords.

118. I am conscious that, as para. 7 of the chairman's report records, it appears there was some level of debate at the meeting in that two modifications to the proposals were proposed. However, it is noteworthy that these were not accepted by Monsoon and that, as a consequence, they were not put to the meeting. This reinforces the conclusion that the outcome of the meeting was determined by the existence of the written proxies in which votes had already been cast for the resolution to accept the CVA.

119. Given the nature of the meeting and the way in which it was organised, I cannot see how the right of the Irish landlords to make representations could have been upheld if they had turned up at the meeting. The procedure which had already been adopted did not take account of their position and of the need (if the fundamental public policy requirements of Irish law were to be met) to give the landlords an opportunity to be heard by all of the creditors participating in the meeting either in person or by proxy. Crucially, this would have required advance notice being given to all of the creditors to that effect so that they would be apprised of the need to consider any such representations **before** casting their votes on the proposed CVA. In this context, I do not go so far as to suggest (as had been argued by counsel for the landlords) that the position of the Irish leases could only be determined by some judicial authority. I do not believe that it is necessary to go so far. Having regard to the broad interpretation to be given to the term *"court"* in the Regulation, I do not exclude the possibility that the Irish leases could have been lawfully addressed by an appropriate mechanism put in place within the CVA process. The basic difficulty, in

terms of recognising the outcome of the CVA process is that the process itself did not provide for any mechanism to permit any necessary representations to be made by the Irish landlords and or for an appropriate mechanism to consider those representations by all of the creditors **in advance** of casting their votes.

The suggestion that the availability of a court challenge cured any want of fair procedures

120. The conclusion reached in para. 119 is not, however, the end of the enquiry. As noted above, counsel for Monsoon argued that the existence of a right to contest the outcome of the CVA process before the English courts cures any possible defect in the underlying CVA process itself. He relied in this context on the observations made by Bork & Mangano (quoted in para. para. 96 above) and by Bork & Van Zwieten (quoted in para. 97 above). I do not, believe that the existence of a right to challenge necessarily has the effect of curing any want of fair procedures at first instance. In my view, the authors of Bork & Mangano and Bork & Van Zwieten go too far in suggesting that the right of appeal or the right of challenge is sufficient to displace the application of Article 33. I note, in this context, that Bork & Mangano expressly rely on Article 34 (2) of the Brussels I Regulation as authority for the proposition that no violation of public policy is to be assumed if the participant in question fails to challenge the judgment when it was possible to do so. This coincides with what is now Article 45 (1) (b) of the Brussels I Recast Regulation which is in identical terms to Article 34 (2) of the previous Regulation. Article 45 (1) (b) provides that, where a judgment is given in default of appearance where a defendant was not served with the initiating document in sufficient time to enable a defence to be arranged, recognition of a judgment can be refused *"unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do*

so". I fully appreciate that, as the CJEU made clear in *Eurofood*, the public policy provision contained in the Regulation should be construed in a similar way to the equivalent provision contained in the Brussels regime (now contained in Article 45 (1) (a) of the Brussels I Recast Regulation). However, the CJEU has not, insofar as I can see, gone so far as to suggest that this applies to Article 45 (1) (b). In my view, it is crucially important to note that Article 45 of the Brussels I Recast Regulation is not mentioned in Article 32.1 of the Recast Insolvency Regulation. As noted earlier in this judgment, Article 32 provides that judgments falling within its ambit (such as a decision to approve a composition with creditors) are to be enforced in accordance with certain provisions of Chapter III of the Brussels I Recast Regulation. However, it is essential to keep in mind that Article 32 (1) does not go so far as to apply the entire of Chapter III to the insolvency regime. Article 32 limits the application of Chapter III solely to Articles 39 to 44 and 47 to 57. No mention is made of Article 45 of the Brussels I Recast Regulation. It is true that Article 45 (1) (a) of the Brussels I Recast Regulation contains an equivalent provision to Article 33 of the Recast Insolvency Regulation. Thus the case law of the CJEU on Article 45 (1) (a) and its predecessor provision is relevant as the decision in *Eurofood* confirms. But that does not, in my view, extend to Article 45 (1) (b) which has no equivalence in the Regulation and is not incorporated into the Regulation by Article 32 (1).

121. I am reinforced in this conclusion by a consideration of the judgment of the CJEU in *Eurofood* itself. There is no suggestion in that judgment (or in the judgment of the Supreme Court in Ireland in the same case) that the existence of a right of appeal cures any failure to afford appropriate fair procedures at first instance. That is not to say that, in any particular case, the existence of a right of appeal would not be an important element in considering whether, in an overall context, there has been a

sufficiently flagrant breach of the fundamental right to be heard to justify the application by the court of a Member State of the public policy exception contained in Article 33. Obviously, if there is a well-established right of appeal or a straightforward application available to set aside the offending decision, that might be sufficient, depending upon the circumstances, to allow a court to conclude that there was no flagrant breach of the right to be heard. Thus, for example, in *Emo Oil Ltd v. Mulligan* [2011] IEHC 552, Dunne J. in the High Court refused to apply the public policy provisions of the 2000 Regulation in respect of a judgment given by the courts of Northern Ireland adjudicating the respondent, Mr. Mulligan, as a bankrupt. At p.p. 9 -10 of her judgment, Dunne J. said:

> *"I think it can be seen from the authorities referred to …, that in general terms a decision based on public policy to refuse recognition to a judgment of another Member State will only arise in exceptional circumstances. The exceptions which have given rise to a refusal to recognise appear to be exceptions in which a fundamental right of an individual or entity has been engaged, such as the right to a fair trial.*
>
> *There is nothing in the submissions before me to suggest that the petitioner in this case cannot make an application in the High Court of Northern Ireland to have the order made in that jurisdiction set aside. Complaint was made on behalf of the petitioner to the effect that the petitioner was not represented before the Courts of Northern Ireland when the order was made in that jurisdiction. Further, the petitioner was not informed of the intention of the debtor to make an application in Northern Ireland. Nevertheless, that does not alter the fact that the petitioner does have a right to make an application in Northern Ireland to have the bankruptcy set aside in that jurisdiction. That*

being so it does not appear to me that any fundamental right of the petitioner has been breached in the circumstances of this case. …".

122. In that case, Dunne J. therefore adjourned the proceedings taken by the petitioner against the debtor in this jurisdiction generally with liberty to re-enter in order to give the petitioner an opportunity to make an application to the High Court in Northern Ireland to set aside the adjudication. While that decision was not the subject of any argument at the hearing before me, it seems to me that it does not assist Monsoon in this case. I have come to that conclusion in circumstances where, on the basis of the conflicting evidence of the experts as to English law (as described in para. 123 below), there is considerable uncertainty as to the ability of the Cork and Dublin landlords to apply to the English courts to set aside the decision taken at the creditors' meeting on the grounds that there had been a failure to apply Irish law under Article 11. That failure to apply Irish law led to the failure to give the Irish landlords an opportunity to be heard by the creditors meeting. Had Irish law been applied (as summarised in paras. 101 to 107 above), an appropriate opportunity to make representations to the creditors' meeting would have been given to the landlords. In this context, notwithstanding the view which I have reached in para. 93 above, it seems to me that the ability to set aside the CVA on that ground is crucial if the failure to accord fair procedures at the CVA approval stage is to have any prospect of being cured. Otherwise, the alleged availability of a court challenge will be entirely illusory. Thus, if the failure at the CVA approval stage is to be cured, one would need to be able to conclude with a sufficient degree of assurance that there is an effective route of challenge available to the Cork and Dublin landlords before the English courts to contest the outcome of the CVA process on the ground that there had been a failure to apply Irish law.

123. Mr. Smith QC suggested that, in the circumstances of this case, there would be no ability on the part of the landlords to apply to the High Court of England & Wales under s. 6 (1) of the UK Insolvency Act (quoted in para. 28 above) in order to pursue a challenge that, by reason of the failure to apply Irish law as required by Article 11, the CVA exceeded the jurisdiction available under Article 11. Mr. Smith QC, however, suggested that it would be open to the landlords to contest the *vires* of the CVA by means of a declaratory action under the ordinary jurisdiction of the English courts albeit that he conceded that the grant of such relief is at the discretion of the court. In contrast, Mr. Briggs, the expert retained by Monsoon, suggested, in his final report, that the only basis upon which a challenge could be taken to the outcome of the CVA process is under s. 6 and he took the view that the landlords would be able to invoke its provisions in order to make the case that the CVA exceeded the jurisdiction under Article 11.

124. Clearly, the fact that such eminent and experienced practitioners take opposing views in relation to the availability of a route of challenge suggests that there is considerable uncertainty as to the correct position under English law. One could not rule out the possibility that Mr. Smith QC is wrong in suggesting that there would be a route of attack under the ordinary jurisdiction of the court and that Mr. Briggs is wrong in suggesting that s. 6 is sufficiently broad to allow a challenge by the Irish landlords under the UK Insolvency Act. In the course of the hearing before me, it was envisaged by the parties that I should attempt to resolve the issue as between the experts and to make a finding (treating English law as a matter to be proved as fact) as to which of the experts is correct in their interpretation of English law. However, in the context of the fair procedures issue, I do not believe that it is necessary or appropriate to do so. The very existence of the conflict shows that there is a level of

uncertainty. The fact that there is such uncertainty seems to me to be of very great significance in the context of fair procedures. In contrast to the *Emo Oil* case, there is no clarity here as to whether there is a right available to the landlords to challenge the outcome before the English courts. In those circumstances, I fail to see how the alleged existence of a right to challenge could be said to cure the defect in fair procedures in the decision of the creditors to accept the CVA. If anything, the uncertainty as to the position in English law compounds the want of fair procedures. It can hardly be suggested to be fair that the landlords would have to take on the burden of taking a challenge to the English court in circumstances where there is such uncertainty as to whether they had such a right of challenge.

Conclusion in relation to public policy

125. In the particular circumstances of this case, I have therefore come to the conclusion that the possibility of an application to the English courts to challenge the outcome of the CVA is not sufficient to displace the conclusion which I have reached that there was a fundamental failure to provide an appropriate opportunity to the Irish landlords to make representations to the meeting of creditors which was to take a decision which would have such significant effects on their property rights under the Cork and Dublin leases. Having regard to the observations of the Supreme Court in the *Dellway* case and in *Eurofood*, it is clear that the obligation to provide an appropriate opportunity to make representations is a principle of public policy of cardinal importance which is necessary in order to give effect to the constitutional guarantee for the protection of property rights. In these circumstances, notwithstanding the great respect which must be paid to the legal system of another Member State, I am constrained to conclude that recognition of the outcome of the CVA process insofar as it affects the Irish landlords would violate the fundamental

principles of the State within the meaning of Article 33 of the Regulation. For the reasons outlined above, I have come to the conclusion that the recognition or enforcement of the CVA as against the Irish landlords would be manifestly contrary to the public policy of the State. I stress that this conclusion relates solely to the procedure adopted in the CVA in this case. As mentioned above, it seems to me that the procedural unfairness which arose in this case could have been avoided had appropriate steps been taken in the course of the CVA process to address it appropriately. I therefore doubt that this decision will have repercussions for the future enforcement of CVAs in Ireland

126. In light of the conclusion which I have reached in relation to procedural fairness, it is unnecessary to consider the case made by the landlords in relation to substantive constitutional law. It is also unnecessary to consider whether it might be appropriate to make a reference to the CJEU for guidance on the issue raised by the current author of Goode in relation to the possibility of an exception to Article 32 where it is suggested that there is an obvious failure to apply the requirements of the Regulation.

Estoppel

127. As discussed at an earlier point in this judgment, estoppel arguments have been raised by both sides. Insofar as the landlords are concerned, they argue that an estoppel arises on foot of the Shoosmiths' letter (quoted in para. 18 above). On behalf of Monsoon, the case was made in its defence that the initiation of these proceedings by the landlords is prohibited by the doctrine of *res judicata* or the doctrine of issue estoppel or the rule in *Henderson v. Henderson* (1843) 3 Hare 100. In my view, no

sufficient basis has been advanced on either side in support of these aspects of their respective cases.

128. Insofar as the landlords are concerned, no evidence has been given by the landlords of detrimental reliance on the alleged representation which the landlords assert was contained in the letter from Shoosmiths. In my view, that is fatal to any case based on estoppel. While counsel for the landlords sought to rely on a decision of McKechnie J. in *Finnegan v. Richards* [2007] 3 I.R. 671, I cannot see anything in the judgment in that case which supports the contention that it is not necessary to give evidence as to detrimental reliance. The only application before McKechnie J. in that case was to dismiss the proceedings on the grounds that they were bound to fail. The application was dismissed. McKechnie J. held that a letter which had been written by the solicitors for the defendant in that case gave rise to an arguable ground of estoppel. However, the judgment was not concerned with the evidence available to support that case. McKechnie J. therefore did not have to concern himself with whether there was evidence of reliance. In contrast, the present hearing was a full hearing of plenary proceedings. The parties were therefore required to place their evidence in full before the court in relation to each of the issues in dispute. No evidence has been advanced in relation to detrimental reliance. In such circumstances, the case made by the landlords on the basis of an alleged estoppel must fail. Accordingly, it is unnecessary to consider any of the other arguments advanced on behalf of Monsoon as to why the estoppel claim is misconceived.

129. Insofar as the case made by Monsoon is concerned, while the issues in relation to *res judicata* and related doctrines were strongly put forward as objections in the defence delivered on behalf of Monsoon, they were not the subject of any sustained argument at the hearing. In these circumstances, I do not believe that a sufficient case

has been made out for the application of *res judicata,* issue estoppel or the rule in *Henderson v. Henderson.* Moreover, it is difficult to see how these principles can be said to have the effect of disapplying the provisions of Article 33. No argument was addressed to that very important issue. In those circumstances, I have concluded that no sufficient case has been made out by the defendants for the application of any of these doctrines.

The guarantee claim against MAIL

130. The Cork premises were originally occupied by MAIL. In June 2013, the lessee's interest in the premises was assigned by MAIL (with the licence of the Cork landlords), to Monsoon. Under the terms of the licence dated 21st June, 2013, MAIL gave an indemnity and guarantee to the Cork landlords in the following terms:

> *"5.1* ***Covenant and indemnity by guarantor:*** *The guarantor hereby covenants with the Landlord, as a primary obligation, that the Assignee or the Guarantor shall duly perform and observe the covenants on the Assignee's part contained in this Licence and shall at all times during the term … duly perform and observe all the covenants on the part of the Assignee contained in the Lease, including the payment of the rents and all other sums payable under the Lease … in the manner and at the times therein specified and all sums which may be due to the Landlord from mesne rates or as payment for the use and occupation of the Premises, and the Guarantor hereby indemnifies the Landlord against all claims, demands, losses, damages, liabilities, costs, fees and expenses whatsoever sustained by the Landlord by reason of or arising in any way directly or indirectly out of any default by the Assignee in the performance and observance of any of its obligations or the payment of any*

rent and other sums arising before or after expiration or termination of the lease…".

131. Furthermore, Clause 5.6 of the licence is also important. Clause 5.6 provides as follows:

"5.6 ***No release of Guarantor:*** *None of the following, or any combination thereof, shall release, determine, discharge or in any way lessen or affect the liability of the Guarantor as principal debtor under the lease or otherwise prejudice or affect the right of the Landlord to recover from the Guarantor to the full extent of this guarantee:*

5.6.1 Any neglect, delay or forbearance of the Landlord in endeavouring to obtain payment of the rents or any part or parts thereof and/or the amounts required to be paid by the Assignee or in enforcing the performance or observance of any of the obligations of the Assignee under the Lease;

5.6.2 Any refusal by the Landlord to accept rent tendered by or on behalf of the Assignee at a time when the Landlord was entitled … to re-enter the Premises;

5.6.3 Any extension of time given by the Landlord to the Assignee;

5.6.4 Any variation of the terms of the Lease … or the transfer of the Landlord's reversion or the assignment of the Lease;

5.6.5 Any change in the constitution, structure or powers of either the Assignee, the Guarantor or the Landlord or the liquidation, administration or bankruptcy (as the case may be) of either the Assignee or the Guarantor;

5.6.6 Any legal limitation, or any immunity, disability or incapacity of the Assignee (whether or not known to the Landlord) or the fact that any dealings

with the Landlord by the Assignee may be outside or in excess of the powers of the Assignee;

5.6.7 Any other act, omission, matter or thing whatsoever whereby, but for this provision, the Guarantor would be exonerated either wholly or in part (other than a release under seal given by the Landlord)".

132. There are identical provisions in the context of the second lease of the Cork premises. MAIL was not a party to the CVA. The case made by the Cork landlords is that, accordingly, the obligations of MAIL on foot of the indemnity and guarantee contained in the licences are unaffected by the outcome of the CVA process.

133. Monsoon contended that, on the assumption that the court enforces the outcome of the CVA process, the claims on foot of the guarantee provisions must fail. It was argued on behalf of Monsoon that the guarantee provisions require that the position of MAIL must be equated with that of Monsoon, the principal obligor. The case made by Monsoon is that the express and unequivocal effect of the CVA was to modify the obligations of Monsoon as principal obligor. It was further submitted that, in accordance with the *"statutory contracts"* created by the outcome of the CVA process, the Cork landlords are treated as having entered into a consensual arrangement with Monsoon pursuant to which its rental obligations on foot of the Cork leases were reduced. In those circumstances, it was argued that it is impermissible for the Cork landlords to claim that the obligations of Monsoon, as principal obligor, are greater than those provided for by the terms of the CVA. Monsoon contended that the guarantee provisions must be construed and applied accordingly such that MAIL can have no greater liability than Monsoon, as principal obligor.

134. In light of my conclusion in relation to Article 33, this issue is no longer live. Nonetheless, lest I am wrong in my conclusion in relation to the application of Article 33, I will address the issue.

135. In my view, the argument made on behalf of Monsoon in relation to the provisions of Clause 5.1 and 5.6 of the respective licences is based on a mistaken premise. Although MAIL is described in the licence as a *"guarantor",* it is clear from the terms of the licences (which are governed by Irish law) that the obligations undertaken by MAIL are in the nature of primary obligations. They are not in the nature of a secondary obligation which is co-extensive with the liability of Monsoon. This seems to me to be clear from the terms of Clause 5.1 of the licence under which MAIL covenanted with the landlord expressly as a *"primary obligation"* that Monsoon or it would duly perform and observe the covenants on Monsoon's part contained in the lease including the payment of rents and all other sums due under the lease. The obligation of MAIL is not couched in terms that it only arises on a default on the part of Monsoon. It is true that clause 5.1 contains an obligation to indemnify the landlord in respect of any losses sustained arising out of a default on the part of MAIL but it is clear from the terms of clause 5.1 that this is an additional obligation to the primary obligation contained in the opening words of the clause. This conclusion is reinforced by the provisions of clause 5.2 which expressly provides that MAIL is jointly and severally liable with Monsoon for the fulfilment of all obligations of Monsoon under the lease and there is a specific agreement in the clause that *"the Landlord, in the enforcement of its rights hereunder, may proceed against the Guarantor as if the Guarantor was named as the tenant in the Lease".*

136. Secondly, it is plain from clause 5.6 of the licence that none of the events specified in sub-clauses 5.6.1 to 5.6.7 would release, determine or in any way lessen

or affect the liability of MAIL as principal debtor under the lease. Among the events specified thereafter is any variation of the terms of the lease. Thus, to the extent that the CVA varied the lease, the provisions of clause 5.6 very clearly, in my view, mean that there is no release of the liability of MAIL as a principal obligor in respect of the obligations which it undertook under the terms of the licence. The result would be the same even if it were the case (which it is not) that MAIL was a guarantor, in the true sense of that word. Clause 5.6 has the effect of neutralising what has become known as the rule in *Holme v. Brunskill* (1878) 3 QBD 495. Under that rule, a guarantor normally stands discharged where a material variation is made to the terms of the principal contract, in this case, the lease between the landlord and Monsoon. However, a provision such as clause 5.6 displaces that rule. This is evident, for example, from the decision of Hogan J. in *ACC Bank Plc v. McCann* [2012] IEHC 236 (where a very similarly worded clause was in issue to that contained in clause 5.6). If such a clause operates to neutralise the rule in *Holme v. Brunskill*, it seems to me to follow that the obligations of MAIL under the licence continue in full force and effect notwithstanding the variation purported to be made to the obligations of Monsoon under the lease as a consequence of the CVA.

137. For completeness, it should also be noted that the terms of the CVA were carefully drafted to ensure that the CVA would not affect the rights or liabilities of any person other than Monsoon itself. Clause 12.2.1 of the CVA provides as follows:

> *"Nothing in this clause 12 or the compromise effected by this CVA shall, except so far as is necessary for the purpose of releasing the company from Liability, affect and it is not intended to affect, the rights or Liabilities of any person other than the Company and the rights of any person other than their rights against the Company (including without limitation, any Liabilities of*

any Contingent Property Creditor to any person, including any Category 6 Landlord). For the avoidance of doubt, and without any limitation, the rights of any Category 6 Landlord against Contingent Property Creditors are fully reserved and unaffected by the CVA, except so far as is necessary for the purpose of releasing the Company pursuant to the terms of a CVA".

138. Both Mr. Smith QC and Mr. Briggs are of the view that, as a matter of English law, clause 12.2.1 does not affect the rights of landlords against relevant third parties, principally any guarantors of leases. According to Mr. Smith, the underlying reason is that it might well constitute unfair prejudice to release landlord's rights against third parties without compensation. Notwithstanding that Mr. Briggs expressed agreement with this view, Monsoon continued to maintain the case at trial that, since the provisions of the licence agreement are governed by Irish law, Monsoon was entitled to make the case outlined in para. 133 above. For the reasons already discussed, I am of the view that Monsoon's argument as to the impact of the CVA on MAIL's obligations under the licence agreements is incorrect.

139. I would therefore determine that, even if the CVA is enforceable in Ireland, it does not affect the entitlement of the landlord to pursue MAIL in respect of the lessee's obligations under the Cork leases.

The relief to be granted

140. In light of the conclusions which I have reached in this judgment, it seems to me that the following orders require to be made:

(a) A declaration in similar terms to that contained in para. 38.3 of the statement of claim delivered in the proceedings taken by the Cork landlords that, for the

purposes of Article 33 of the Recast Insolvency Regulation, the CVA, insofar as it purports to effect any variations of or modifications to the terms of each of the Cork and Dublin leases respectively, is not entitled to be recognised or enforced in the State on the grounds that, to do so, would be manifestly contrary to the public policy of the State;

(b) In addition, insofar as the proceedings taken by the Cork landlords are concerned, it is appropriate to make a declaration in similar terms to that contained in para. 38.8 of the statement of claim in that case that the obligations of MAIL under the licence as described above are not released, determined, discharged, or in any way lessened or affected by any purported variation of the said leases in or pursuant to the CVA or by any action purported to be taken by Monsoon in respect thereof.

(c) I will direct that the plaintiff's solicitors in the Cork and Dublin proceedings should prepare a draft order and should liaise with the solicitors for the defendants with a view to agreeing the terms of the draft order. If agreed, the draft order should be submitted to the registrar not later than fourteen days from the date of this judgment. If there is disagreement as to the form of the order, then each of the parties should submit to the registrar not later than fourteen days from the date of this judgment, a draft of the order which they respectively believe should be made, having regard to the terms of this judgment.

(d) Insofar as costs are concerned, the parties should seek to agree the form of order to be made in relation to costs. In the event that the parties are unable to agree the form of order to be made, written submissions in relation to costs should be furnished to the registrar not later than fourteen days from the date

of this judgment following which I will give a written ruling in relation to costs.